34840

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IN RE PETITION OF ANTON J. VESELY
UNDER THE INSOLVENT DEBTORS ACT

FRED H. MEYER,
(Respondent),
Appellant.

APPEAL FROM COUNTY
COURT, COOK COUNTY.

261 I.A. 637

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Anton J. Vesely filed a petition for release under the Insolvent Debtors act, and from an order entered discharging the petitioner from the custody of the sheriff of Cook county, Fred H. Meyer, respondent, has appealed. The petitioner, Vesely, has filed neither an appearance nor a brief in this court.

Upon the hearing of the petition, the respondent, Meyer, introduced in evidence the amended declaration, verdict of the jury and judgment of the court in the case of Fred H. Meyer v. Anton J. Vesely, in the Superior court of Cook county. The amended declaration consists of two counts. Count one alleges that "on July 16, 1928, the defendant Anton Vesely with force and arms, etc. in the County aforesaid, assaulted the plaintiff, and with great force and violence drove a certain automobile which was then and there being driven, operated and was under the control of the said defendant, upon a public highway, within the Corporate limits of the village of Maywood, at a speed which was not reasonable and proper having regard to the traffic and use of the highway and at a speed exceeding fifteen miles per hour, which was then and there an unlawful act and in the doing of which, the said defendant drove his aforesaid automobile upon the plaintiff and thereby violently knocked the plaintiff down from his automobile, which he was then and there operating, upon the ground, whereby the plaintiff was then

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20 I.A. 637

MR. JUSTICE BOANEAN DELIVERED THE OPINION OF THE COURT.

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Upon hearing of the petition, the respondent, Meyer, introduced in evidence the amended declaration, verdict of the jury, judgment of the court in the case of Fred H. Meyer v. Anton Vesely, in the Superior court of Cook county. The amended declaration consists of two counts. Count one alleges that "on July 1028, the defendant Anton Vesely with force and arms, etc. in County aforesaid, assaulted the plaintiff, and with great force violence drove a certain automobile which was then and there being driven, operated and was under the control of the said defe, upon a public highway, within the corporate limits of the ge of Maywood, at a speed which was not reasonable and proper having regard to the traffic and use of the highway and at approximately fifteen miles per hour, which was then and there an act and in the doing of which, the said defendant drove his said automobile upon the plaintiff and thereby violently knocked plaintiff down from his automobile, which he was then and operating, upon the ground, whereby the plaintiff was then

and there greatly hurt, bruised and wounded," etc. The second count alleges that on July 16, 1928, "the defendant Anton Vesely, with force and arms, etc. in the County aforesaid, assaulted the plaintiff and with great force and violence drove a certain automobile which was then and there being driven, operated and was under the control of the said defendant and was driven by him in a westerly direction on Madison Street, which is a public highway in the village of Maywood, to and against the automobile of the plaintiff, which was being driven by the said plaintiff in a southerly direction on 15th avenue, also being a public highway in the village of Maywood, County and State aforesaid, and that the said defendant failed to give the said plaintiff the right of way at the said intersection, which was then and there an unlawful act, and in the doing of which, the said defendant drove said automobile upon the plaintiff and his automobile, and thereby violently knocked the plaintiff down upon the ground; whereby the plaintiff was then and there greatly hurt, bruised and wounded." The declaration concludes as follows: "And other wrongs the defendant to the plaintiff then and there did, to the great damage of the plaintiff, and against the peace of the people of this State. Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of Five thousand dollars ($5,000.00), and therefore he brings his suit, etc." To these counts the defendant filed a plea of not guilty. There was a trial before the court, with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at the sum of $1,000. The defendant prayed an appeal but never perfected it. A capias was issued and the defendant taken into custody by the sheriff, and he thereupon filed in the County court the petition in question.

Count one, in substance, charges that the defendant (petitioner) committed an assault with an automobile upon the plaintiff, Fred H. Meyer (respondent), and that this assault was

and there grevily hurt, bruised and wounded," etc. The second count alleges that on July 16, 1928, "the defendant Anson Veesely, with force and arms, etc. in the County aforesaid, assaulted the plaintiff and with great force and violence drove a certain automobile which was then and there being driven, operated and was under the control of the said defendant and was driven by him in a westerly direction on Madison Street, which is a public highway in the village of Maywood, to and against the automobile of the plaintiff, which was being driven by the said plaintiff in a southerly direction on 15th avenue, also being a public highway in the village of Maywood, County and State aforesaid, and that the said defendant failed to give the said plaintiff the right of way at the said intersection, which was then and there an unlawful act, and in the doing of which, the said defendant drove said automobile upon the plaintiff and his automobile, and thereby violently knocked the plaintiff down upon the ground; whereby the plaintiff was then and there gravely hurt, bruised and wounded." The declaration concludes as follows: "And other wrongs the defendant to the plaintiff then and there did, to the great damage of the plaintiff, and against the peace of the people of this State. Therefore the plaintiff says that he is injured, and has sustained damage to the amount of Five thousand dollars ($5,000.00), and therefore he brings his suit, etc." To these counts the defendant filed a plea of not guilty. There was a trial before the court, with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at the sum of $1,000. The defendant prayed an appeal but never perfected it. A ruling was issued and the defendant taken into custody by the "sheriff", and he thereupon filed in the County court the petition in question.

Count one, in substance, charges that the defendant (petitioner) committed an assault with an automobile upon the plaintiff, Fred H. Meyer (respondent), and that this assault was

committed while the defendant was in the commission of another unlawful act. Count two makes a like charge. The declaration, in form, is such as is used in an action of trespass for an assault, etc. The driver of an automobile may be guilty of an assault with a deadly weapon. (See The People v. Benson, 321 Ill. 605, 611.) It was held in Fetz v. The People, 239 Ill. 250, 251-3, that where a count charges that the defendant with force and arms assaulted the plaintiff and with great force and violence drove his automobile to and against her, against the peace of the People of the State of Illinois, such a charge implies malice. It has been frequently held that in an action of trespass for an assault and battery, malice is the gist of the action, and a defendant, where a judgment has been rendered against him in such an action, and he is held in custody under a capias ad satisfaciendum, is not entitled to a discharge from imprisonment under the Insolvent Debtors act. (In re Murphy, 109 Ill. 31; In re Mullin, 118 Ill. 551; The People v. Walker, 286 Ill. 541, 543. See also In the Matter of John Bobzin, 220 Ill. App. 470, and cases cited therein.) It would follow, of course, from the above rule, that malice would be the gist of an action where the charge was an assault of a more serious nature than assault and battery.

The County court erred in ordering the petitioner, Vesely, released from custody, and the judgment of that court is reversed and the cause is remanded with directions that the petitioner, Vesely, be returned to the custody of the sheriff.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Kerner, JJ., concur.

sentiment which the defendant was in the commission of another unlawful act. Cases lay undue stress. The conclusion, in fact, is never so is used in an action of trespass for an assault, etc. The crime of an automobile may be guilty of an assault with a deadly weapon. (See People v. Ferrara, 221 Ill. 607, 612.) It was held in Pate v. The People, 229 Ill. 580, 581-5, that where a court charges that the defendant with force and arms assaulted the plaintiff and with great force and violence drove his automobile to and against her, against the peace of the People of the State of Illinois, such a charge implies malice. It has been frequently held that in an action of trespass for an assault and battery, malice is the gist of the action, and a defendant, where a judgment has been rendered against him in such an action, and he is held in custody under a capias ad satisfaciendum, is not entitled to a discharge from imprisonment under the insolvent debtors act. (In re Fuller, 1-8 Ill. 214; In re Smith, 112 Ill. 572; The People v. Fuller, 22 Ill. 341, 344. See also In the Matter of John Spears, 221 Ill. 492, 470, and cases cited therein.) It would follow, of course, from the above rule, that malice would be the gist of an action where the charge was on account of a more serious nature than assault and battery.

The County court erred in ordering the petitioner, Veenly, released from custody, and the judgment of that court is reversed and the cause is remanded with directions that the petitioner, Veenly, be returned to the custody of the sheriff.

REVERSED AND REMANDED WITH DIRECTIONS.

Ryan and Scott, JJ., concur.

34576

INGER ANDERSEN,
Appellee,

v.

JACOB KLEIN,
Appellant.

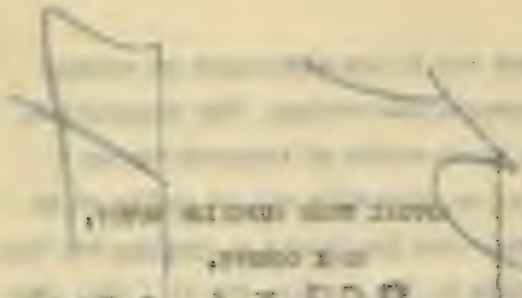
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

261 I.A. 637

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Inger Andersen sued Jacob Klein in an action in case. There was a trial before the court, with a jury, and a verdict returned finding defendant guilty and assessing plaintiff's damages in the sum of $8,000. Judgment was entered on the verdict and defendant has appealed. The suit was originally commenced against Jacob Klein and Lillian Klein, but at the close of all the evidence plaintiff dismissed as to Lillian Klein.

Plaintiff sued to recover damages for personal injuries sustained by reason of her falling through a glass skylight on the roof of a one-story building known as No. 4546 Cottage Grove avenue, Chicago. Defendant was engaged in the plumbing and heating supply business, with offices at 4548 Cottage Grove avenue. This was a two-story building on the west side of the street and was owned by defendant. He used the ground floor for his business and on the second floor there were a front and a rear apartment, separated by a porch about twenty feet across. Directly to the north of this building was a one-story building, which was used by defendant as a storeroom for supplies. This building was known as No. 4546 Cottage Grove avenue. The roof of this building was covered with tar paper and sand and was about 150 feet in length. Toward the rear of this roof was a skylight, between three and one-half and four feet square, which was elevated above the level of the roof



between four and seven inches. Two or three wires used as clothes-lines were stretched from the porch between the two apartments on the second floor of No. 4548 across the roofs of Nos. 4548 and 4546 and to the south side of the building immediately to the north of No. 4546. One of these wires or clotheslines passed "within a foot or so" of the skylight. In December, 1925, defendant leased the front second floor apartment at No. 4548 to plaintiff under an oral lease. Plaintiff testified that at the time she rented the apartment defendant told her that there was no laundry in the basement and that the tenants washed their clothes in the kitchen, and that defendant pointed to the wires or clotheslines that stretched across the roofs of the two buildings and told her that the other tenants used these wires and that she might hang her washing on them, as the property (No. 4546) belonged to him. Plaintiff testified that between six and seven o'clock a. m., September 18, 1926, she was hanging her wash on the line; that just before the accident happened she was about a foot or so from the skylight with her back to it and she was hanging the clothes; that her foot sunk into the roof and she fell backward, overbalanced, and fell through the skylight and sustained the injuries for which she sued. No one save plaintiff testified as to the manner of the accident.

Defendant alleges and argues a number of points in support of his contention that the order should be reversed and the cause remanded. In the view that we have taken of this appeal we deem it necessary to notice one only. Defendant contends that the great weight of the evidence shows that plaintiff was guilty of contributory negligence that directly contributed to the injuries in question. After a careful and painstaking examination of the evidence bearing upon this contention we have reached the conclusion that it is a meritorious one. The fifth count of the declaration alleged that the skylight "was covered with tar paper and was thereby hidden so

between four and seven inches. Two or three wires used as clothes-lines were stretched from the porch between the two apartments on the second floor of No. 4543 across the roofs of Nos. 4545 and 4549 and to the south side of the building immediately to the north of No. 4546, one of these wires or clothslines passed within a foot or so of the skylight. In December, 1928, defendant loaned the front second floor apartment at No. 4549 to plaintiff under an oral lease. Plaintiff testified that at the time she rented the apartment defendant said her that there was no laundry in the basement and that the tenants washed their clothes in the kitchen, and that defendant pointed to the wires or clothslines that stretched across the roofs of the two buildings and said her that the other tenants used these wires and that she might hang her washing on them, as the property (No. 4546) belonged to him. Plaintiff testified that between six and seven o'clock on Sept. 13, 1929, she was hanging her wash on the lines; that just before the accident happened she was about a foot or so from the skylight with her back to it and she was hanging the clothes; that her foot took hold of the rod and she fell backward, overbalanced, and fell through the skylight and sustained the injuries for which she sued. No one saw plaintiff fall or to the manner of the accident.

Defendant pleaded and argued a number of grounds in support of his contention that the order should be reversed and the cause remanded. In the view that we have taken of this appeal we deem it necessary to notice one only. Defendant contends that the great weight of the evidence shows that plaintiff was guilty of contributory negligence that directly contributed to the injuries in question. After a careful and painstaking examination of the evidence herein upon this contention we have reached the conclusion that it is a meritorious one. The first count of the declaration alleged that the skylight was covered with tar paper and was thereby hidden so

as not to be perceptible as a skylight, and plaintiff had no knowledge that there was or ever had been a skylight," and it was the theory of fact of plaintiff that the skylight was covered with tar paper and thereby hidden, but she failed to prove that the skylight was covered with tar paper. She testified that there was tar paper and sand on the roof but that she could not say whether the skylight "was covered with tar paper or dirt," that she "never examined it;" that she did not know that the skylight was covered with anything; that she never saw any glass in it "because it is black." Mrs. Thompson, a witness for plaintiff, testified that "there was glass across the skylight." Kennedy, also a witness for plaintiff, testified that the roof was "a tar paper roof" and that there was a skylight on the roof that "was built up about six inches above the level of the roof," but that he never examined the skylight to determine if it was covered. The evidence shows very clearly that the skylight was made of "fire-resisting glass, wire glass," and that it was not covered with tar paper. It was built to furnish light to the store space below it. The theory of fact of plaintiff was that there was no fence or guard around the skylight, but after examining all the evidence bearing upon that subject we are satisfied that there was a fence around the skylight, between eighteen and twenty-four inches high, which was set upon posts. A lieutenant in the Chicago Fire Department, who, with his company, was called to the place in question immediately after the accident occurred, testified that the skylight was made of glass and that there was a fence around it, and that in order to look down through the skylight to see plaintiff he had to "stoop down and look over" the fence. He also testified that there were two or three panes of glass broken in the skylight. Plaintiff testified that she did not know whether she broke any glass when she fell through the skylight. However, her principal witness, Mrs. Thompson, testified that there was glass across the

as not to be pretty-pretty as a skylight, and plaintiff had no knowledge that there was or ever had been a skylight," and it was the theory of first of plaintiff that the skylight was covered with tar paper and thereby hidden, but she failed to prove that the skylight was covered with tar paper. The evidence that there was tar paper was found on the roof but that was not sufficient to show the skylight was covered with tar paper or dirt, that she "never examined it;" that she did not know that the skylight was covered with anything; that she never saw any glass in it "because it is black." Mr. Thompson, a witness for plaintiff, testified that "there was glass across the skylight." Kennedy, also a witness for plaintiff, testified that his roof was "a tar paper roof" and that there was a skylight on the roof that "was built up about six inches above the level of the roof," but that he never examined the skylight to determine if it was covered. The evidence shows very clearly that the skylight was made of "fire-resisting glass, wire glass," and that it was not covered with tar paper. It was built to furnish light to the store space below it. The theory or fact of plaintiff was that there was no fence or guard around the skylight, but after examining all the evidence bearing upon that subject we are satisfied that there was a fence around the skylight, between eighteen and twenty-two inches high, which was six inches wide. Lincoln-Mary in the Chicago City Department, who, with his company, was called to the place in question immediately after the accident occurred, testified that the skylight was made of glass and that there was a fence around it, and that in order to look down through the skylight to see plaintiff he had to "stoop down and look down over" the fence. He also testified that there were two or three panes of glass broken in the skylight. Plaintiff testified that she did not know whether she broke any glass when she fell through the skylight. However, her principal witness, Mr. Thompson, testified that there were glass across the

skylight and that after the accident "the glass was broken;" "there was just glass setting around one side, one end, and there was a big open space where Mrs. Anderson went through." Plaintiff testified that for about nine or ten months before the accident she hung out her washing about once or twice a week on the lines in question and that just before the accident she was standing about a foot or so from the skylight, with her back to it, and was hanging the clothes; that "my foot sank into the roof and I fell backwards - overbalanced." "Q. What do you mean, 'It sank in the roof'? A. The tar paper or board or whatever it was - I went into it and I over-balanced. Q. Where did you fall? A. I fell through the skylight."

Plaintiff's case, as alleged in the declaration, proceeded upon the theory that defendant was the owner of the premises in question and that he permitted the roof surrounding the skylight to become and remain in a dangerous and dilapidated condition, and that he had knowledge of such condition, or by the exercise of reasonable diligence could have had knowledge of it, and that plaintiff, while in the exercise of due care, by reason of the defective roof, tripped and fell upon and against said skylight. Plaintiff undertook to prove that at the time of the accident defendant owned the property at No. 4546, but the evidence clearly shows that he did not. As we understand the theory of fact of plaintiff, her "foot sank into the roof" and she "fell backward, overbalanced * * * through the skylight." Plaintiff testified that before the accident she never noticed anything wrong with the roof; "there was nothing wrong with the roof as far as I know; I didn't see anything wrong." The witness Kennedy testified that he did not know what the condition of the roof was prior to the accident. Mrs. Thompson testified as follows: "Mr. Lawrence (attorney for defendant): Q. What was the

objects on that side the defendant "the place was crowded;" "there was just plenty passing around one side, one end, and there was a big open space where the defendant was standing." Plaintiff testified that for about nine or ten months before the accident she had been not working about once or twice a week on the floor in question and that just before the accident she was standing about a foot or so from the opening, with her back to it, and she tumbling the statement that "my foot sunk into the roof and I felt background - overbalanced." Q. What do you mean, 'it sank in the roof'? A. The tin paper or board or whatever it was - I went into it and I over-balanced. Q. Where did you fall? A. I fell through the opening."

Plaintiff's case, as alleged in the complaint, proceeded upon the theory that defendant was the owner of the premises in question and that he permitted the roof covering the skylight to become and remain in a dangerous and dilapidated condition, and that he had knowledge of such condition, or by the exercise of reasonable diligence could have had knowledge of it, and that plaintiff, while in the exercise of due care, by reason of the defective roof, tripped and fell upon and against said skylight. Plaintiff undertook to prove that at the time of the accident defendant owned the property at No. 4548, but the evidence clearly shows that he did not. In we understand the theory of fact of plaintiff, her "foot sunk into the roof" and she "fell backward, overbalanced * * * through the skylight." Plaintiff testified that before the accident she never noticed anything wrong with the roof; "there was nothing wrong with the roof as far as I know; I didn't see anything wrong." The witness Kennedy testified that he did not know what the condition of the roof was prior to the accident. Mrs. Thompson testified as follows: "Mr. Lawrence (attorney for defendant): Q. Just was the

condition of the roof, do you know? A. It looked all right. Mr. Baird (attorney for plaintiff): When? Mr. Lawrence: Before the accident. A. Yes. Q. Looked all right? A. It looked all right. That's all I know." The great weight of the evidence proves that the roof was in good condition at the time of the accident.

The condition of the roof and skylight was open and obvious to plaintiff and she was thoroughly familiar with the place in question. The great preponderance of the evidence supports the theory of defendant that plaintiff, while standing with her back to the skylight and preoccupied in hanging out her washing, forgot her close position to the skylight and stepped backward, and that in so doing she struck against the fence surrounding the skylight, overbalanced, and fell through the skylight.

The judgment of the Superior court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley and Kerner, JJ., concur.

condition of the roof, or you know. A. It looked all right.
Mr. Baker (continuing the plaintiff's cross) Mr. Lawrence, Brown
the contract. Q. Yes. A. Looked all right. A. It looks
all right. That's all I know". The civil records of the criminal
prove that the roof was in good condition at the time of the
incident.

The condition of the roof was slippery was open and
obvious to plaintiff and she was thoroughly familiar with the
place in question. The proximate cause of the criminal
supports the theory of defendant that plaintiff, while shopping
with her back to the skylight and preoccupied in bringing out her
wallet, lost her place position in the skylight and slipped
backward, and that in so doing she struck against the frame
surrounding the skylight, overbalanced, and fell through the
skylight.

The judgment of the Superior court of Cook County is
affirmed and the cause is remanded.

AFFIRMED AND REMANDED.

Pridley and Moreno, JJ., concur.

34607

RICHARD J. LAFFEY,
Appellee,

v.

CITY OF CHICAGO,
a Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

261 I.A. 637

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Richard J. Laffey, plaintiff, sued the City of Chicago, a municipal corporation, in an action in case. There was a trial before the court, with a jury, and a verdict returned finding defendant guilty and assessing plaintiff's damages at the sum of $3,500. Judgment was entered on the verdict and defendant has appealed.

Plaintiff sued to recover damages for personal injuries and property damage sustained by him in an accident that occurred May 18, 1928, on Morgan street, between 74th and 75th streets, near an overhead railroad viaduct. The accident was caused by a large hole in the street near the viaduct, which caused the truck plaintiff was driving to be thrown against one of the pillars of the viaduct. Plaintiff was hurled from his seat on the truck against a pillar of the viaduct, and the truck was practically demolished and he was seriously injured. The street near the locus in quo was poorly lighted and the accident occurred at night when it was quite dark. The defect in the street had continued for a long time.

Defendant contends that "the declaration and each and every count thereof, is insufficient to support the judgment;" that "the first count of the declaration fails to state a cause of action," and "the second count is based on property damage only, and is insufficient to sustain an award for personal injuries

No.

RICHARD J. LAMPRY,
Appellee,

v.

CITY OF CHICAGO,
a Municipal Corporation,
Appellant.

ERROR, COOK COUNTY.

HON. WM. AUGUSTUS
LUTKIN, PRESIDING JUSTICE.

MR. JUSTICE DUNNE DELIVERED THE OPINION OF THE COURT.

Richard J. Lampry, plaintiff, sued the City of Chicago, a municipal corporation, in an action in case. There was a trial before the court, with a jury, and a verdict returned finding defendant guilty and assessing plaintiff's damages at the sum of $2,000. Judgment was entered on the verdict and defendant has appealed.

Plaintiff sued to recover damages for personal injuries and property damage sustained by him in an accident that occurred May 14, 1932, on Halsted street, between 74th and 75th streets, near an overhead railroad viaduct. The accident was caused by a large hole in the street near the viaduct, which caused the truck plaintiff was driving to be thrown against one of the pillars of the viaduct. Plaintiff was hurled from his seat on the truck against a pillar of the viaduct, and the truck was practically demolished and he was serious ly injured. The street near the hole in one was poorly lighted and the accident occurred at night when it was quite dark. The defect in the street had continued for a long time.

Defendant contends that "the declaration and each and every count thereof, is insufficient to support the judgment;" that "the first count of the declaration fails to state a cause of action," and "the second count is based on property damage only, and is insufficient to sustain an award for personal injuries

suffered by the plaintiff." Defendant argues that count one of the declaration is fatally defective. Plaintiff contends that count one states a cause of action but defectively and is therefore good after verdict. It is a sufficient answer to defendant's contention to state that if it be conceded that the first count is insufficient to support a recovery, the second count states a good cause of action and is sufficient to support the verdict and judgment. The contention of defendant that the second count is based on property damage only is without the slightest merit. The pleader, in drafting that count, adopted paragraphs one, two and four of the first count as paragraphs one, two and four of the second count. The fourth paragraph of count one alleges that plaintiff "became sick, sore, lame and disordered and divers bones of his body were broken and injured and he sustained various contusions, bruises, and lacerations about his head, arms, body and limbs and divers of his muscles, tendons and sinews became wrenched and bruised and he suffered a severe and permanent shock to his nervous system and suffered great pain and anguish and will in the future thus suffer; that he sustained contusions and lacerations of the scalp, completely severing certain nerves of his head, leaving irregular deep and permanent scar on his face and forehead; dislocation and fracture and fracture of the shoulder bone, certain of his ribs were fractured and broken, ligaments of the ankle were torn leaving the ankle permanently disabled and certain of the vertebrae of his spinal column were fractured; * *"

Defendant next contends that "the court erred in overruling the motion of the defendant, made at the close of all the evidence, to instruct the jury to find the defendant not guilty," for the reason that the "plaintiff failed to prove the contents of the statutory notice set forth in the declaration." Defendant is not in a position to raise this contention for the reason that during

suffered by the plaintiff." Defendant argues that assault was at the destruction in fundly defective. Plaintiff contends that count one states a cause of action but defectively and is therefore good after verdict. It is a sufficient answer to defendant's contention to state that it is conceded that the first count in plaintiff's original is a tenancy, the second count states a good cause of action and is sufficient to support the verdict and judgment. The contention of defendant that the second count is based on property damage only is without the slightest merit. The pleader, in drafting this count, adopted paragraphs one, two and four of the first count as paragraphs one, two and four of the second count. The fourth paragraph of count one alleges that plaintiff "became sick, sore, lame and disordered and sinews came of his body were broken and injured and he sustained various contusions, bruises, and lacerations about his head, arms, body and limbs and divers of his muscles, tendons and sinews became wrenched and bruised and he suffered a severe and permanent shock to his nervous system and suffered great pain and anguish and still is the future from and will that he sustained contusions and lacerations of the scalp, completely severing certain nerves of his head, leaving irregular deep and permanent scar on his face and temporal; dislocation and fracture and fracture of the shoulder bone, certain of his ribs were fractured and broken, lingering at the edge, with sharp jagged ends, permanently disabled and certain of the vertebrae of his spinal column were fractured." **

Defendant next contends that "the court erred in overruling the motion of the defendant, made at the close of all the evidence, to instruct the jury in time the defendant not guilty," for the reason that the "plaintiff failed to prove the contents of the preliminary notice set forth in the pleadings." Defendant is not in a position to raise this contention for the reason that during

the trial it stipulated and agreed "that the usual statutory notice was served on the City of Chicago." Even if this stipulation had not been made there would be no merit in the point it now makes. The notice, as pleaded in the declaration, stated "that the physician attending said Richard J. Laffey is Doctor C. K. Barnes of 7849 South Eggleston Avenue and that said Richard J. Laffey was taken to the Auburn Park Hospital situated at 78th and S. Eggleston Avenue." The testimony showed that Dr. Barnes was the attending surgeon at the Auburn Park hospital, located at 78th street and South Eggleston avenue, and that plaintiff was taken there immediately after the accident and remained there for some time, during which period he was attended by Dr. Barnes. The proof further showed that the residence of the doctor was 7838 Stewart avenue, and defendant argues that "it matters not whether the city was or was not misled by the statements contained in the notice," as it appears from the record that plaintiff failed to prove a material allegation of his declaration, towit, "that the statutory notice set forth in the declaration set forth the correct address of his attending physician." Par. 7, sec. 2, ch. 70 Cahill's Ill. Rev. Stat., provides: "Any person who is about to bring any action or suit at law * * * against any incorporated city * * * for damages on account of any personal injury shall * * * file in the office of the city attorney * * * a statement in writing * * * giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident, the place or location where such accident occurred, and the name and address of the attending physician (if any)." (Italics ours.) The statute does not require that the residence of the attending physician be given, and the proof showed the address of the physician as stated in the notice that is pleaded in the declaration.

The third and last contention of defendant is that the

the brief is originated and argued "that the moral obligation which accrued on the City of Chicago." Even if this stipulation had not been made there would be no merit in the point it now makes. The motion, as phrased in the defendants, states "that the plaintiff attorney with leave to L. Duffy is Doctor C. B. Barnes of 7349 South Ingleside Avenue and that said Plaintiff L. Duffy was taken to the Lakeview Post Graduate Hospital on this and T. Spielman Counsel." The instrument showed that Dr. Barnes was the attending surgeon at the Post Graduate. Instead of this issue was that Spielman counsel, and that plaintiff was taken there immediately after the accident and remained there for some time, during which period he was attended by Dr. Barnes. The proof further showed that the residence of the doctor was 7349 Stewart avenue, and defendant argues that "it matters not whether the city was or was not mailed by the statements contained in the notice," as it appears from the record that plaintiff failed to prove a material allegation of his declaration, to-wit, "that the statutory notice set forth in the declaration set forth the correct address of his attending physician." Par. 7, sec. 2, ch. 77 Public Acts. Ibid., provides: "Any person who is about to bring any action or suit at law * * * against any incorporated city * * * for damages on account of any personal injury shall * * * file in the office of the city attorney * * * a statement in writing * * * giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident, the place or location where such accident occurred, and the name and address of the attending physician (if any)." (Italics ours.) The statute does not require that the residence of the attending physician be given, and the proof showed the address of the physician as stated in the notice that is placed in the declaration.

The third and last contention of defendant is that the

court erred in giving, at the instance of plaintiff, the following instruction: "4. The Court instructs the jury that if from a preponderance of the evidence, under the instructions of the court, you find for the plaintiff; in such event, in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should take into consideration all the evidence pertaining to plaintiff's physical injuries, the nature and extent of plaintiff's physical injuries, which are the proximate result of the accident, if any, so far as the same are shown by the evidence; his suffering, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence before them in this case he has sustained, or will sustain by reason of such injuries; and may find for him such sum as in the judgment of the court, will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages are claimed and alleged in the declaration or some count thereof, and proven by a preponderance of the evidence." (Italics ours.) Defendant argues that the instruction is erroneous for the reason that it is for the jury, and not the court, to determine the amount of compensation that shall be awarded to the plaintiff. Defendant admits that other given instructions stated correct rules of law relating to the question of damages. The instruction does not direct a verdict, and while there is manifestly a typographical error in the use of the word "court" instead of "jury," the jury could not have been misled by this error, especially in view of the fact that other instructions correctly informed them as to the law bearing on the subject in question. However, the instant contention is without the slightest merit for the reason that this instruction relates solely to the question of damages and defendant does not contend that the

court erred in giving, at the instance of plaintiff, the following instruction: "4. The court instructs the jury that if from a preponderance of the evidence, under the instructions of the court, you find for the plaintiff in such event, in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury may, *may* if *right* is, and they should take into consideration all the evidence pertaining to plaintiff's physical injuries, the nature and extent of plaintiff's claiming injuries, which are the proximate result of the accident, if any; so far as the same are shown by the evidence are certain, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence after them in this case to have been sustained, or will sustain by reason of such injuries; and may find for the same and in the judgment of the court, will be a fair compensation for the injuries so sustained or will sustain, if any, so far as such damages are claimed and alleged in the declaration or same count thereof, and proven by a preponderance of the evidence." (Italics ours.) Defendant argues that the instruction is erroneous for the reason that it is for the jury, and not the court, to determine the amount of compensation that should be awarded to the plaintiff. Defendant admits that other given instructions state correct rules of law relating to the question of damages. The instruction does not direct a verdict, and while there is manifestly a typographical error in the use of the word "court" instead of "jury," the jury could not have been misled by this error, especially in view of the fact that other instructions correctly informed them as to the law bearing on the subject in question. However, the instant contention is without the effectively until the 4th second line. All instructions relate solely to the question of damages and defendant does not contend that the

damages are excessive. Considering the seriousness of the injuries sustained by plaintiff the verdict of $3,500 is a moderate one.

That the plaintiff had a meritorious cause of action against defendant is not disputed. Defendant has had a fair trial, and the judgment of the Superior court of Cook county should be and it is affirmed.

AFFIRMED.

Gridley and Kerner, JJ., concur.

tempts the economists. Constituting the antithesis of the injurious mutations in plasticity the variety of Ga.Ph.Ia is a positive one.

That the plaintiff had a motivations cause of action against defendant is not disputed. Defendant has had a fair trial, and the judgment of the Superior Court of Cook county should be and it is affirmed.

AFFIRMED.

Gidding and Kenny, JJ., concur.

34616

JAMES C. WARD,
Appellee,

v.

GRAND TRUNK WESTERN RAILWAY COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

261 I.A. 637

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

James C. Ward, plaintiff, sued Grand Trunk Western Railway Company, a corporation, in an action in case. There was a trial before the court, with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at $5,000. Judgment was entered on the verdict and the defendant has appealed.

On March 13, 1929, the plaintiff had been in the employ of the defendant as a brakeman for four days. On that date, he was working as an extra brakeman on the night shift, on an east bound freight train which left Chicago about 9:30 p. m., March 13, 1929. At about 12:05 a. m., March 14, 1929, the engine of the train ran into a "derail" at Stilwell, Indiana, and turned over. The plaintiff claims that he "was standing up in the engine looking for signals" and that as soon as he saw the red light the engine had already hit the derail and "was practically turning over" and that he jumped and sustained the injuries for which he sued. The defendant has assigned and argued a number of points in support of its contention that the judgment should be reversed and remanded. In the view that we have taken of this appeal it is necessary to consider only one. The defendant contends that the overwhelming weight of the evidence proves that the plaintiff did not sustain the alleged injuries in the accident in question. After a very careful

James G. Tang, plaintiff, sued Grand Trunk Western Railway Company, a corporation, in an action in case. There was a trial before the court, with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at $8,000. Judgment was entered on the verdict and the defendant has appealed.

On March 14, 1920, the plaintiff had been in the employ of the defendant as a brakeman for four days. On that date, he was working on an entire brakeman on the night shift, on an east bound freight train which left Chicago about 7:30 p. m., March 13, 1920. At about 12:00 a. m., March 14, 1920, the engine of the train ran into a "derail" at Stickney, Illinois, and burned over. The plaintiff claims that he "was standing up in the engine looking for signals" and that as soon as he saw the red light the engine had already hit the derail and "was practically turning over" and that he jumped and sustained the injuries for which he sued. The defendant has assigned and argued a number of points in support of its contention that the judgment should be reversed and remanded. In the view that we have taken of this appeal it is necessary to consider only one. The defendant contends that the overwhelming weight of the evidence proves that the plaintiff did not sustain the alleged injuries in the accident in question. After a very careful

consideration of the evidence we are satisfied that this contention is a meritorious one. Indeed, as we read the evidence bearing upon the instant contention, it is difficult for us to understand the verdict of the jury, and still more difficult to understand the action of the trial court in sustaining it. However, as the case may be tried again, we refrain from analyzing and commenting upon the many facts and circumstances that bear upon the instant contention.

The judgment of the Superior court of Cook County is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley and Kerner, JJ., concur.

consideration of the evidence we are satisfied that this conclusion is a unanimous one. Indeed, as we read the evidence bearing upon the issues involved, it is difficult for us to understand the verdict of the jury, and still more difficult to understand the action of the trial court in sustaining it. However, as the case may be tried again, we refrain from analyzing and commenting upon the many facts and circumstances that bear upon the instant controversy.

The judgment of the Superior court of Cook County in reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Dailey and Stoney, JJ., concur.

34625

STANLEY J. LASSA,
Appellee,

v.

PAUL S. BERGAMINI,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

261 I.A. 638

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Stanley J. Lassa, plaintiff, sued Paul S. Bergamini, defendant, in an action in contract. The case was tried before the court, with a jury, and there was a verdict returned finding the issues against defendant and assessing plaintiff's damages at the sum of $456.68. Judgment was entered on the verdict and defendant has appealed.

Plaintiff sued to recover for work, labor and material furnished by him to defendant. Counsel for defendant has seen fit to refer to a number of well known principles of law that have no application to any alleged errors that have been called to our attention. To illustrate: Defendant, in his brief, alleges that repeated statements of plaintiff's counsel in argument were so prejudicial as to require a reversal of the judgment, in view of the trial court's failure to sustain objections to them, but neither the argument of counsel for plaintiff nor defendant is contained in the bill of exceptions. Defendant alleges, in his brief, that the case should be reversed because of misconduct of plaintiff's counsel, but he fails to point out, in his argument, the alleged misconduct.

Defendant contends that the trial court erred in permitting the counsel for plaintiff to ask leading questions of plaintiff upon direct examination. Our attention has not been called to the particular questions of which defendant complains. From a reading of the

Trial Court.

HENRY T. LANGE,
Appellee,

v.

HAN E. BORGMINI,
Appellant.

Appeal from Municipal Court
of Chicago.

No. 20 I.A. 638

Trial Court affirmed.

Opinion filed

Plaintiff, Henry T. Lange, sue Hans E. Borgmini, defendant, in an action in contract. The case was tried before the court, with a jury, and there was a verdict returned finding the issues against defendant and assessing plaintiff's damages at the sum of $[illegible].00. Judgment was entered on the verdict and defendant has appealed.

Plaintiff sued to recover for work, labor and material furnished by him to defendant. Counsel for defendant has been its to refer to a number of well known principles of law that have no application to any alleged errors that have been called to our attention. To illustrate: Defendant, in his brief, alleges that repeated statements of plaintiff's counsel in argument were so prejudicial as to require a reversal of the judgment, in view of the trial court's failure to sustain objections to them, but neither the arguments of counsel for plaintiff nor defendant is contained in the bill of exceptions. Defendant alleges, in his brief, that the case should be reversed because of misconduct of plaintiff's counsel, but he fails to point out, in his argument, the alleged misconduct.

Defendant contends that the trial court erred in permitting the counsel for plaintiff to ask leading questions of plaintiff upon direct examination. Our attention has not been called to the particular questions of which defendant complains. From a reading of the

testimony of plaintiff, however, we find that on several occasions leading questions were permitted. It appears that plaintiff, shortly before the time he testified, had suffered a paralytic stroke; that his memory was bad and that it was difficult for him to talk. The court stated that he allowed the leading questions because of the condition of plaintiff. In fact, plaintiff's condition was such that his counsel finally asked to be allowed to withdraw the witness. The allowance of leading questions, calling the attention of the witness to the subject matter with reference to which his testimony is desired, rests largely in the discretion of the trial court and will not call for a reversal in the absence of a clear abuse of discretion. (McCann v. The People, 286 Ill. 562.) There is no merit in the instant contention. Neither is there the slightest merit in the contention of defendant that the trial court asked plaintiff certain leading questions and thereby prejudiced the defense.

Defendant next contends that the verdict was not only clearly against the great weight of the evidence but that plaintiff failed to make out a prima facie case. After a careful examination of the evidence we find no merit in this contention.

Defendant next contends that the trial court erred in limiting the time of the closing argument to the jury to fifteen minutes on each side and thereby unreasonably abridged the constitutional right of defendant to have a defence by counsel. From the record we ascertain the following: At the conclusion of the evidence the court stated that he would allow each side fifteen minutes for closing argument, and thereupon the counsel for defendant stated: "I don't think I'll cover it in fifteen minutes." No objection was made to the time limit, and while the record shows that counsel for each side addressed the jury, the arguments are not contained in the bill of exceptions. For aught that appears in this

testimony of plaintiff, however, we find that on several occasions leading questions were permitted. It appears that plaintiff, shortly before the time he testified, had suffered a paralytic stroke; that his memory was bad and that it was difficult for him to talk. The court stated that he allowed the leading questions because of the condition of plaintiff. In fact, plaintiff's condition was such that his counsel finally asked to be allowed to withdraw the witness. The allowance of leading questions, calling the attention of the witness to the subject matter with reference to which his testimony is desired, rests largely in the discretion of the trial court and will not call for a reversal in the absence of a clear abuse of discretion. (Nelson v. The People, 204 Ill. 324.) There is no merit in the instant contention. Neither is there the slightest merit in the contention of defendant that the trial court asked plaintiff certain leading questions and thereby prejudiced the defense.

Defendant next contends that the verdict was not only clearly against the preponderance of the evidence but that plaintiff failed to make out a prima facie case. After a careful examination of the evidence we find no merit in this contention.

Defendants next contend that the trial court erred in limiting the time of the closing arguments to the jury to fifteen minutes on each side and thereby unreasonably abridged the constitutional right of defendant to have a defense by counsel. From the record we ascertain the following: At the conclusion of the evidence the court stated that he would allow each side fifteen minutes for closing arguments, and thereupon the counsel for defendant stated: "I don't think I'll cover it in fifteen minutes." No objection was made to the time limit, and while the record shows that counsel for each side addressed the jury, the arguments are not contained in the bill of exceptions. For aught that appears in this

record, counsel for defendant may have concluded his argument in less than fifteen minutes. He certainly failed to make any request for further time. The present contention is clearly an afterthought.

There is no merit in this appeal and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley and Kerner, JJ., concur.

34634

ANNA G. FLOOD and EMMET T. FLOOD,
Appellees,

v.

JAMES HOULIHAN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

261 I.A. 638

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Anna G. Flood and Emmet T. Flood sued James Houlihan in the Municipal court of Chicago in an action in contract. Plaintiffs brought the action to recover for rent for the month of May, 1930, $70, and attorney's fees, $15. Judgment by confession for $85 was entered upon a written lease between the parties. Subsequently, upon motion of defendant, he was given leave to defend, the judgment to stand as security. The case was tried by the court, without a jury, and there was a finding "that at the date of the rendition of the judgment by confession there was due from the defendant, to the plaintiffs, the sum of $85," and a final judgment was entered that the judgment entered against defendant by confession stand confirmed. Defendant has appealed.

Plaintiffs were the owners of the apartment building, No. 6525 North Francisco avenue, Chicago, and on October 1, 1928, there was a written lease executed between them and defendant by which the upper floor of the building was demised to the latter for residential purposes for a term of two years, at a monthly rental of $70. Defendant appears to have paid his rent regularly for a period of nineteen months and to have made no complaints until December, 1929. He continued to occupy the premises until May, 1930, but after December plaintiffs were compelled to enforce the collection of the rent by

96654

IRA S. FLOOD and NANCY T. FLOOD, Appellees,	
v.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
JAMES SCHILLING, Appellant.	

MR. PRESIDING JUSTICE MCNAMEE DELIVERED THE OPINION OF THE COURT.

Ahna S. Flood and Nancy T. Flood sued James Schilling in the Municipal Court of Chicago in an action in contract. Plaintiff's brought the action to recover for rent for the month of July, 1930, $70, and attorney's fees, $15. Judgment by confession for $85 was entered upon a written lease between the parties. Subsequently, upon motion of defendant, he was given leave to defend, the judgment to stand as security. The case was tried by the court, without a jury, and there was a finding "that at the date of the rendition of the judgment by confession there was due from the defendant, to the plaintiff, the sum of $85," and a final judgment was entered that the judgment entered against defendant by confession stand confirmed. Defendant has appealed.

Plaintiffs were the owners of the apartment building, No. 6525 North Ravenswood avenue, Chicago, and on October 1, 1929, there was a written lease executed between them as defendant by which the upper floor of the building was demised to the latter for a residential purpose for a term of two years, at a monthly rental of $70. Defendant appears to have paid his rent regularly for a period of nineteen months and to have made no complaints until December, 1929. He continued to occupy the premises until July, 1930, but after December plaintiffs were compelled to enforce the collection of the rent by

confessions of judgment on the lease and garnishment proceedings. Defendant and his family left the premises on May 1, 1930, and he claims that he was constructively evicted by reason of obscenity and vulgarity on the part of plaintiffs and by various interferences and annoyances perpetrated upon him and the members of his family by plaintiffs. The court heard the evidence bearing upon the question of the alleged constructive eviction and found against defendant in that regard. We are entirely in accord with the court's finding. The evidence shows that plaintiffs desired to be at peace with defendant and that the latter was a man of bad temper, who in his dealings with plaintiffs exhibited such a disregard for common decency that we cannot sully the records of this court by stating the facts that have led us to this conclusion. A finding in favor of defendant would not have been justified under the proof. It is to be regretted that the time of this court should be taken up in passing upon an appeal like the instant one.

The judgment of the Municipal court of Chicago will be affirmed.

AFFIRMED.

Gridley and Kerner, JJ., concur.

conclusions of judgment on the issue and garnishment proceedings. Defendant and his family left the premises on May 1, 1930, and he claims that he was constructively evicted by reason of unsanitary and unhygienic on the part of plaintiffs and by various interferences and annoyances perpetrated upon him and the members of his family by plaintiffs. The court heard the evidence bearing upon the question of the alleged constructive eviction and found against defendant in that regard. We are entirely in accord with the court's finding. The evidence shows that plaintiffs desired to be at peace with defendant and that the latter was a man of bad temper, who in his dealings with plaintiffs exhibited such a disposition for common decency that we cannot really the wonder at this court for finding the facts that have led us to this conclusion. A finding in favor of defendant would not have been justified under the proof. It is to be regretted that the issue of this case should be taken up in passing upon an appeal like the instant one.

The judgment of the municipal court of Chicago will be affirmed.

AFFIRMED.

Stanley and Kerner, JJ., concur.

34646

BENZOLINE MOTOR FUEL COMPANY,
a corporation,
Appellee,

v.

CONSUMERS PETROLEUM COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

261 I.A. 638

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Benzoline Motor Fuel Company, a corporation, sued Consumers Petroleum Company, a corporation, in assumpsit. There was a trial before the court, with a jury, and a verdict returned finding the issues for plaintiff and assessing its damages at the sum of $1,700. Judgment was entered on the verdict and defendant has appealed.

Plaintiff's original declaration consists of one count, which alleges that on, towit, October 21, 1928, plaintiff entered into an oral agreement with defendant "regarding the leasing of certain tank storage space," owned by defendant, and "that the defendant leased to the plaintiff certain storage tanks aggregating a capacity of 340,000 gallons of tank storage space, for the purpose of storaging benzoline, a certain fuel manufactured and sold by the plaintiff," and that as a part of the agreement defendant agreed that the storage tanks "contained steam coils which would hold steam of sufficient pressure for the heating of the oil and benzoline, to be stored in said tanks by the plaintiff," so that the benzoline or oil could be pumped from the said tanks when the weather was cold; that after the cold weather had set in the benzoline froze in the tanks; that plaintiff attempted to force steam into the tanks

[illegible]

[illegible] MOTOR FUEL COMPANY,
a corporation,
Appellant,

v.

[illegible] MOTOR MERCHANTS
ASSOCIATION OF COOK COUNTY,
a corporation,
Appellee.

No. 24113 - Agenda No. 2 - MOTION FOR REHEARING.

Consolidated Motor Fuel Company, a corporation, and [illegible] Motor Fuel Company, a corporation, is assessed. There was a trial before the court, with a jury, and a verdict returned finding the issues for plaintiff and assessing its damages at the sum of $1,700. Judgment was entered on the verdict and defendant has appealed.

Plaintiff's original declaration consists of one count, which alleges that on, until, October 21, 1926, plaintiff entered into an oral agreement with defendant "regarding the leasing of certain tank storage space," owned by defendant, and "that the defendant leased to the plaintiff certain storage tanks adjoining a capacity of 240,000 gallons of tank storage space, for the purpose of storing benzoline, a certain fuel manufactured and sold by the plaintiff," and that as a part of the agreement defendant agreed that the storage tanks "contained steam coils which would hold steam of sufficient pressure for the heating of the oil and benzoline, to be stored in said tanks by the plaintiff," so that the benzoline or oil could be pumped from the said tanks when the weather was cold; that after the cold weather had set in the benzoline from in the tanks; that plaintiff attempted to force steam into the tanks

but the coils therein would not hold steam; that the benzoline was frozen during the months of December, January, February, March and April; that during that time plaintiff could not withdraw any benzoline except small quantities which remained liquid or melted, due to the heat given by the atmosphere; that the market for benzoline dropped and by reason thereof plaintiff sustained damages in the sum of $10,000. The count also alleges that it was a part of the agreement that it, defendant, would supply the steam and heat for the tanks, and that plaintiff would pay for the coal and fuel used by defendant "in heating the tanks and the supplying of the steam," and that plaintiff agreed to pay defendant $450 a month "during the time it would occupy these tanks." After a jury had been sworn to try the issues, plaintiff, by leave of court, filed an additional count. This count alleges that "on the 21st day of October, A. D. 1927, it, the plaintiff, made and entered into a certain oral agreement with the defendant * * * for the leasing of certain storage space in a certain 340,000 gallon storage tank, owned and controlled by the defendant, for a good and valuable consideration; and the plaintiff avers that the defendant leased to the plaintiff this said 340,000 gallon storage tank space at the monthly rental of four hundred fifty dollars ($450.00) per month; and then and there the plaintiff avers that a part of said oral agreement made by the plaintiff and the defendant for the leasing of said tank storage space by the plaintiff the defendant agreed with the plaintiff that the storage tank so leased by the plaintiff contained steam coils which would heat the tank and which would hold sufficient pressure of steam for the heating of the benzol to be stored by the plaintiff to the proper temperature at which said benzol could be pumped from said tank during the months of December, January, February and March and during the period of cold weather; and the plaintiff avers that the said lease made by the plain-

for the gain thereof, and that it was agreed that the defendants was liable during the months of December, January, February, March and April; that during that time the plaintiff could not withdraw any petroleum except such quantities which remained liquid or boiled, due to the heat given off the substances; that the weight of the petroleum dropped and by reason thereof plaintiff sustained damages in the sum of $10,000. The court also alleges that it was a part of the contract that it, defendant, would supply the steam and heat for the tanks, and that plaintiff would pay for the coal and fuel used by defendant "in boiling the tanks and the supplying of the steam," and that plaintiff suffered by reason thereof $2000 a month "during the time it would occupy these tanks." Also a jury had been waived by the owner, plaintiff, by leave of court, filed an additional count. This count alleges that "on the 21st day of October, A. D. 1917, it, the plaintiff, made and entered into a certain oral agreement with the defendant & & for the leasing of certain storage space in a certain $47,000 gallon storage tank, owned and controlled by the defendants, for a good and valuable consideration; and the plaintiff avers that the defendants leased to the plaintiff this said 540,000 gallon storage tank space at the monthly rental of four hundred fifty dollars ($450.00) per month; and that the plaintiff avers that a part of said oral agreement made by the plaintiff and the defendants for the leasing of said tank storage space by the plaintiff the defendant agreed with the plaintiff that the storage tank so leased by the plaintiff contained steam coils which would heat the tank and which would hold sufficient pressure of steam for the heating of the product to be stored by the plaintiff to the proper temperature as which said product could be pumped from said tank during the months of December, January, February and March and during the period of cold weather; and the plaintiff avers that the said lease made by the plain-

tiff from the defendant of the storage tank above was for the express purpose of storing benzol, a product which froze at a high temperature;" that plaintiff agreed to pay defendant the cost of the coal to be used by defendant to produce the steam; that defendant undertook and agreed to load and unload cars and other equipment in the filling and emptying of the tank and to use its pump in pumping the benzol in and out; that plaintiff took possession of the tank and filled the same with benzol and paid all costs and charges for handling, filling and pumping; that the product remained in the tank until after the cold weather set in and plaintiff then sought to remove divers of the benzol and attempted to force steam into the coils but that said coils would not hold steam and would not heat the fuel and benzol so stored therein, so that plaintiff often attempted to force steam into said tank and coils, and because of defendant's failure to supply good coils to heat the said tank, it, the plaintiff, could not for a long time remove the benzol so stored from the tank because the benzol became and was frozen and could not be heated to a flowage condition and that the benzol was frozen during the months of December, January, February, March and April, and that plaintiff could not withdraw or remove any of the benzol except such small portions as remained liquid or melted by reason of the heat of the atmosphere; and plaintiff further avers that when it could remove and did remove the benzol from the tank it was pumped by defendant with pumps used by it to pump fuel oil from adjacent tanks, which greatly discolored, injured, diluted and ruined the benzol, whereby the market value of the benzol dropped, to the damage of plaintiff in the sum of $10,000.

Defendant alleges and strenuously argues a number of points in support of its contention that the judgment should be reversed and the cause remanded. In the view that we have taken of this appeal we will notice two only.

tiff from the defendant of the storage tank above was for the express purpose of storing "petrol", a product which that is a high temperature, that plaintiff agreed to pay defendant the cost of the coal to be used by defendant to produce the steam that defendant maintain and repair in fact and without duty and other equipment in the filling and emptying of the tank and to use the pump in pumping the petrol in and out; that plaintiff took possession of the tank and filled the same with petrol and paid all costs and charges for handling, filling and pumping; that the product remained in the tank until after the cold weather set in and plaintiff then sought to remove dregs of the petrol and attempted to force steam into the coils but that said coils would not hold steam and would not heat the fuel and petrol so stored therein, so that plaintiff often attempted to force steam into said tank and coils, and because of defendant's failure to supply good coils to heat the said tank, it, the plaintiff, could not for a long time remove the petrol so stored from the tank because the petrol became and was frozen and could not be heated to a flowage condition and that the petrol was frozen during the months of December, January, February, March and April, and that plaintiff could not siphon or remove any of the petrol except such small portions as remained liquid or melted by reason of the heat of the atmosphere; and plaintiff further avers that when it could remove and did remove the petrol from the tank it was pumped by defendant with pump used by it to pump fuel oil from adjacent tanks, which greatly disadvantaged, injured, hindered and ruined the petrol, thereby the market value of the petrol stopped, to the damage of plaintiff in the sum of $10,000.

Defendant alleges and extraneously argues a number of points in support of its contention that the judgment should be reversed and the cause remanded. In the view that we have taken of this appeal we will notice two only.

Defendant contends that there is a material variance between the declaration and the proof. Defendant contends that upon the trial of the cause plaintiff's case was based entirely upon the claim set up in the additional count and that there was a material variance between the case alleged in that count and the case made by the proof. That plaintiff's case was tried entirely upon the additional count is clear. That count alleges that "on the 21st day of October, A. D. 1927, it, the plaintiff, made and entered into a certain oral agreement with the defendant." No agreement made at any other time is alleged in the count. The evidence introduced by plaintiff showed two separate agreements, one made in October and one in November. Plaintiff contends that defendant has waived the alleged variance by not specifically raising the question in apt time in the trial court. The record does not justify this claim of waiver. When the witness Kesner, called by the plaintiff, testified to the agreement made in November, the following occurred: "Mr. Bartel (attorney for defendant): Now, if the Court please, I move that that be stricken on the ground that it is not in conformity with the declaration. The declaration alleges that this took place on the 21st of October, 1927. The Court: Overruled." Plaintiff assumes that in the additional count it alleged the date of the agreement under a videlicet, and it contends that, therefore, there is no merit in defendant's contention; but it is clear that in that count plaintiff did not allege the date of the agreement under a videlicet. Plaintiff next contends that "no motion was made by the defendant at the close of plaintiff's evidence to strike this evidence from the record nor was any such motion made at the close of all of the evidence, * * * and its failure to so preserve its record amounts to a waiver." The cases cited by plaintiff do not support the instant contention. Plaintiff

Defendant contends that there is a material variance between the evidence and the proof. Defendant contends that upon the trial of the cause plaintiff's counsel for the first time upon the claim set up in the additional count that there was a material variance between the case alleged in that count and the case made by the proof. This plaintiff's case was tried entirely upon the additional count in chief. That count alleges that "on the 21st day of October, A.D. 1927, it, the plaintiff, made and entered into a written and agreement with the defendant." No agreement made at any other time is alleged in the count. The evidence introduced by plaintiff showed the separate agreements, one made in October and one in November. Plaintiff contends that defendant has waived the alleged variance by not specifically raising the question in his plea in the trial court. The record does not justify this claim of waiver. Plea the written answer, relied by the plaintiff, besides to the agreement made in November, the following averment: "Mr. Barbel testimony for defendant is Yes, if the Court please, I move that that be stricken on the ground that it is not in conformity with the declaration. The declaration alleges that this took place on the 21st of October, 1927. The Court: Overruled." Plaintiff assumes that in the additional count it alleged the date of the agreement under a videlicet, and it contends that, therefore, there is no merit in defendant's contention; but it is clear that in that count plaintiff did not allege the date of the agreement under a videlicet. Plaintiff next contends that "no motion was made by the defendant at the close of plaintiff's evidence to strike this evidence from the record nor was any such motion made at the close of all of the evidence, * * * and the failure to so preserve the record amounts to a waiver." The cases cited by plaintiff do not support the instant contention. Plaintiff

also contends that "the question of variance is waived, in that the defendant did not include this proposition in its assignment of error." In support of this contention plaintiff cites Maney Milling Co. v. Baker-Wignall & Co., 136 Ill. App. 390. In that case it appeared that the question of variance was not raised in the trial court and there was no assignment of error that the court erred in the admission of evidence. In the instant case the question of variance was raised upon the trial and one of the assignments of error is: "The Court erred in permitting immaterial, irrelevant and incompetent testimony on behalf of defendant." This assignment was sufficient to cover the question of the alleged variance. We think that there are other assignments of error sufficiently broad to cover this question.

Defendant contends that "the verdict is clearly and manifestly against the weight of the evidence." After a careful examination of the evidence we have reached the conclusion that this contention is a meritorious one. As the case may be tried again we refrain from analyzing and commenting upon the facts and circumstances that bear upon the instant contention.

The judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley and Kerner, JJ., concur.

also remarks that "the question of evidence is novel, in that the statutes did not include this proposition in the assignment of error." In support of this contention plaintiff cites Henry Billing Co. v. Bohner-Ismail & Co., 124 Ill. App. 390. In that case it appeared that the question of variance was not raised in the trial court but that one of assignment of error that the court erred in the admission of evidence. In the instant case the question of variance was raised upon the trial and one of the assignments of error is: "The Court erred in permitting immaterial, irrelevant and incompetent testimony on behalf of defendant." This assignment was sufficient to cover the question of the alleged variance. We think that there are other assignments of error sufficiently broad to cover this question.

Defendant contends that "the verdict is clearly and manifestly against the weight of the evidence." After a careful examination of the evidence we have reached the conclusion that this contention is a meritorious one. In the case may be tried again on certain item supplying and commending upon the facts and circumstances that have come to instant proceedings.

The judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Taylor and Crane, JJ., concur.

34667

LUSSKY, WHITE & COOLIDGE, INC., a Corporation,
Appellee,

v.

THOMAS F. KENNELLY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

261 I.A. 638

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant in the sum of $330.23 in a suit upon two checks. The case was tried by the court.

Plaintiff sued to recover upon the two following checks:

"Kennelly & Heffernan, Inc.
Furniture Co.
4641 Lexington St. Chicago, Ill. October 25th, 1928

Pay to the order of LUSSKY WHITE & COOLIDGE, INC. $202.17
The Sum * * $202 and 17 cts Dollars

To West Town State Bank
Madison St. at Western Ave.
Chicago. T. F. Kennelly"

John J. Heffernan

"Kennelly & Heffernan, Inc.
Furniture Co.
4641-43 Lexington St. Chicago, Ill. October 24th, 1928

Pay to the order of Lussky White & Coolidge, Inc. $128.06
The Sum * * $128 and 06 cts. Dollars

To West Town State Bank
Madison St. at Western Ave.
Chicago T. F. Kennelly"

John J. Heffernan

Upon the trial the checks were marked Plaintiff's Exhibits 1 and 2. In defendant's affidavit of merits he avers that the two checks were not executed by him individually, but as an officer of Kennelly & Heffernan, Inc., a corporation, and that the indebtedness, if any, is the indebtedness of that corporation, and that defendant does not owe plaintiff $330.23, as alleged in plaintiff's statement of claim, or any part of said sum.

[illegible], [illegible] & [illegible], Inc.,
a Corporation,

Plaintiff,

v.

FRANKLY T. MCGREGOR,

Defendant.

} ABSTRACT FROM MEMORANDUM

COURT OF CHICAGO,

2d I.A. 638

MR. MCGREGOR DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment against defendant in the sum of $320.00 in a suit upon two checks. The case was tried by the court.

Plaintiff sued to recover upon the following checks:

John T. McGregor

"Commonly & Hoffman, Inc.
Twelfth Ave.
4221 Lexington Ave. Chicago, Ill. October 22th, 1928

Pay to the order of Smooth Paper & Cardboard, Inc. $160.00
The sum of - - Ten and 17 cts Dollars

To Very Town State Bank
Madison St. at Twelfth Ave.
Chicago

T. T. Commonly"

John T. McGregor

"Commonly & Hoffman, Inc.
Twelfth Ave.
4221 Lexington Ave. Chicago, Ill. October 24th, 1928

Pay to the order of Smooth Paper & Cardboard, Inc. $160.00
The sum of - - $160 and 00 cts. Dollars

To Very Town State Bank
Madison St. at Twelfth Ave.
Chicago

T. T. Commonly"

Upon the trial the checks were marked Plaintiff's Exhibits 1 and 2. In defendant's affidavit of merits he avers that the two checks were not executed by him individually, but as an officer of Commonly & Hoffman, Inc., a corporation, and that the indebtedness, if any, is the indebtedness of that corporation, and that defendant does not owe plaintiff $320.00, as alleged in plaintiff's statement of claim, or any part of said sum.

When plaintiff rested its case defendant, in his defense, did not call any witnesses or introduce any documentary evidence, but simply offered to prove that "Plaintiff's Exhibits 1 and 2 were given in consideration of goods, wares and merchandise used by Kennelly & Heffernan, Inc.; that the plaintiff had theretofore accepted checks signed in the same manner as Plaintiff's Exhibits 1 and 2 and that Plaintiff's Exhibits 1 and 2 were corporate obligations." Plaintiff's objection to this offer was sustained.

Par. 40 of the Negotiable Instruments Act provides as follows:

> "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability."

Defendant contends that it appears from the face of each check that defendant in signing it was acting in a representative capacity, in behalf of a principal, and that therefore he comes within the provisions of paragraph 40 and is not personally liable for the checks; that each check, upon its face, and without the introduction of any parol evidence, shows that he signed it "for or on behalf of the principal, or in a representative capacity," and that he is therefore not liable on the instruments. None of the Illinois cases cited by defendant supports this contention. In Mathis v. Liberty Straw Spreader Co., 238 Ill. App. 467, it was held that where a note was signed with the name of a corporation followed by the president's name, with the affix "Pres.," the president was not personally liable on the note, in view of paragraph 40 and the proof offered to show the capacity in which the defendant signed the instrument. But it was further held that if the president had signed his name, followed by "President," or other descriptive words, but had not disclosed his

Then plaintiff needed its sole defendant, in his capacity, did not sell any shares or interest to innocent purchasers, but simply offered to prove that "Plaintiff's Exhibits 1 and 2 were given in consideration of goods, being the merchandise sold by Kennedy & Matthewson, Inc.; that the plaintiff had therefore accepted checks signed in the same manner as Plaintiff's Exhibits 1 and 2 and that Plaintiff's Exhibits 1 and 2 were corporate obligations." Plaintiff's objection to this offer was sustained.

Sec. 40 of the Negotiable Instruments Act provides as follows:

> "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal or in a representative capacity, he is not liable on the instrument if he proves that the name of the principal was genuine and that he signed as agent, or in fulfilling a representative character believed that he had authority from the principal; does not exempt him from personal liability."

Defendant contends that it appears from the face of each check that defendant in signing it was acting in a representative capacity, in behalf of a principal, and that therefore he comes within the provisions of paragraph 40 and is not personally liable for the checks; that each check, upon its face, and without the introduction of any parol evidence, shows that he signed it "for or on behalf of the principal, or in a representative capacity," and that he is therefore not liable on the instruments. None of the Illinois cases cited by defendant supports this contention. In Martin v. Liberty Trust Company, 238 Ill. App. 627, it was held that where a note was signed with the name of a corporation followed by the president's name, with the suffix "Pres.," the president was not personally liable on the note, in view of paragraph 40 and the proof offered to show the capacity in which the defendant signed the instrument. But it was further held that if the president had signed his name, followed by "President," or other descriptive words, but had not disclosed his

principal, he would be personally liable under paragraph 49, and parol evidence would not be admissible to show the capacity in which the note was executed. In La Salle Nat. Bank v. Tolu Rock & Rye Co., 14 Ill. App. 141, the acceptance of the bill of exchange drawn on the defendant corporation was signed: "Accepted, payable at 41 River street, Chicago. Tolu Rock & Rye Co. F. E. Davis, Treas." In Scanlan v. Keith, 182 Ill. 634, the note "was signed underneath, at the right hand, 'Sam'l L. Keith, Pres't Chicago Ready Roof'g Co.,' and at the left hand, at the usual place for the signature of an attesting witness, it is signed, 'W. H. Kretzinger, Sec'y,' with the seal of the 'Chicago Ready Roofing Company' attached." In Iscowski v. Grabarski, 181 Ill. App. 279, where the signatures to a note were: "Albert F. Grabarski, Pres. F. J. Tomczak, Secy.", the court held that the introduction of the note made a prima facie case against the defendants individually but that the trial court, under the particular circumstances of the case, properly permitted the defendants to introduce oral evidence to prove that the note was not given for the individual indebtedness of the makers but was given to the plaintiff by a corporation of which the makers were president and secretary. Undoubtedly, in view of the nature of the signatures, the ruling in that case, in reference to the right of the defendant to introduce oral evidence, runs counter to other Illinois cases, but it does not aid defendant's contention. In the instant case the signatures of defendant on the checks are not followed by any designation of any official or representative capacity, and therefore none of the foregoing cases cited by defendant is applicable. Hill Binding Co. v. F. J. Koch Co., 207 Ill. App. 217, also cited by defendant, is not in point. In that case it appeared that the corporation had the same name as the president of the corporation, and the court held that oral evidence was admissible to show whether the signature was intended to be that of the president personally or of the corporation.

principal, he would be personally liable under paragraph 69, and parol evidence would not be admissible to show the capacity in which the note was executed. In Julie Et. Bank v. Tom Hook & Bro Co., 14 Ill. App. 143, the acceptance of the bill of exchange known as the defendant corporation was signed: "Hughes, President, Parkin & Co. Stone Mfrs., Chicago. Tom Hook & Bro Co. F. E. Davis, Treas." In Benjamin v. Smith, 108 Ill. 624, the note "was signed unofficially, at the right hand, 'Geo'l L. Smith, Treas's Chicago Rocky Rock'g Co.,' and at the left hand, as the usual place for the signature of an attesting witness, it is signed, 'W. H. Kretzinger, Sec'y,' with the seal of the 'Chicago Rocky Rocking Company' attached." In Leopold v. Gerstenberg, 141 Ill. 444, where the sign was in a note read: "Albert F. Gerstenberg, Pres. H. L. Gunther, Sec'y", the court held that the introduction of the note made a prima facie case against the defendants individually but that the trial court, under the particular circumstances of the case, properly permitted the defendants to introduce oral evidence to prove that the note was not given for the individual indebtedness of the maker but was given in the capacity of a representative of which the maker was president and secretary. Undoubtedly, in view of the nature of the signature, the ruling in that case, in reference to the right of the defendant to introduce oral evidence, was correct to other facts cases, but it does not aid defendant's contention. In the instant case the signature of defendant on the checks are not followed by any designation of any official or representative capacity, and therefore none of the foregoing cases cited by defendant is applicable. Hill Mining Co. v. N. Y. & Long Co., 207 Ill. App. 417, also cited by defendant, is not in point. In that case it appeared that the corporation had the same as the president of the corporation, and the court held that oral evidence was admissible to show whether the signature was intended to be that of the president personally or of the corporation.

Defendant's instant argument assumes that oral testimony is unnecessary to prove the capacity in which defendant signed the checks, but in his argument in support of his second contention he states that there is a substantial doubt raised from an inspection of the face of the checks as to the capacity in which he signed the instruments and that, therefore, oral testimony was necessary. There is another reason why the instant contention cannot be sustained. Paragraph 40 contains the provision, "if he was duly authorized," and there was no evidence introduced by plaintiff or defendant to prove that the latter was duly authorized to sign checks for Kennelly & Heffernan, Inc. The instant contention is without merit. (See the late case of Herman v. Met. Petroleum Co., 253 Ill. App. 536.)

However, the major contention of defendant, and the one upon which he relies, is that the court erred in sustaining the objection of plaintiff to the offer of proof made by defendant. In his argument in support of his instant contention defendant says: "There can be no doubt that upon the proof of the evidence offered, rested the defendant's case." Defendant, in his argument, concedes that his defense depended upon his right to show by parol evidence the capacity in which he signed the checks, and he contends that "there is substantial doubt created by the counter-signature and the corporation name on the checks, as to warrant the use of parol evidence to explain the ambiguity." Plaintiff calls attention to the fact that defendant's signatures on the checks are not followed by any designation of any official or representative capacity and that therefore, under paragraph 40, parol evidence was not admissible to show that defendant signed the checks in a representative capacity. In view of paragraph 40 and certain Illinois decisions construing it, we think that there is great force in this contention, but it is not necessary to decide it, in view of the ruling we are about to make upon another contention of plaintiff.

Defendant's instant argument assumes that oral testimony is necessary to prove the capacity in which referees signed the checks, but in his argument in support of his second contention he admits that there is a substantial doubt raised from an inspection of the face of the checks as to the capacity in which he signed the instruments as an individual, corporate, and partnership are necessary. There is another reason why the instant contention cannot be sustained. Paragraph 40 contains the provision, "if he was duly authorized." and there was no evidence introduced by plaintiff to defendant to prove that the latter was duly authorized to sign checks for Kennedy & Heffernan, Inc. The instant contention is without merit. (See the late case of Bryson v. Nat. Fireproofing Co., 465 Ill. App. 556.)

However, the main contention of defendant, and the one upon which he relies, is that the court erred in sustaining the objection of plaintiff to the offer of proof made by defendant. In his argument in support of his instant contention defendant says: "There can be no doubt that upon the proof of the evidence offered, vested the interpleader's case." Defendant, in his argument, concedes that his defense depended upon his right to show by parol evidence the capacity in which he signed the checks, and he contends that "there is considerable case cited by the interpleader-claimants and the corporation name on the checks, as to warrant the use of parol evidence to explain the ambiguity." Plaintiff calls attention to the fact that defendant's signatures on the checks are not followed by any designation of any official or representative capacity and that therefore, under paragraph 40, parol evidence was not admissible to show that defendant signed the checks in a representative capacity, in view of paragraph 41 and certain Illinois decisions construing it. We think that there is great force in this contention, but it is not necessary to decide it, in view of the ruling we are about to make upon another contention of PLAINTIFF.

It appears that defendant did not call any witness or produce any documentary evidence, but rested his defense upon the so-called offer. In Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 328-9, the court said: "Appellant, in fact, offered no evidence upon the matter. No witness was put upon the stand; no question was asked. Nothing was done except a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered, and counsel cannot, by engaging in a mere conversation with the court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the court upon which he can predicate error. If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked." In Harman v. Indian Grove Drainage District, 217 Ill. App. 502, 509, it was said: "This offer of proof was made before the court had ruled upon the objection to the question and was, therefore, premature. It is not proper to make an offer of proof until the court has sustained an objection to a question propounded for the purpose of eliciting the desired evidence." In Stevens v. Newman, 68 Ill. App. 549, the court said: "Appellants offered to prove the 'allegations of their petition.' This was insufficient. The witnesses should be called and questioned, or documentary evidence produced. A mere statement of an offer to prove is not anything upon which a court is called upon to act." In Nelson v. Miller, 195 Ill. App. 233, 234, it was held that remarks of the court in a discussion with counsel

It appears that defendant did not call any witness or produce any documentary evidence, but rested his defense upon the so-called offer. In Delano City Ry. Co. v. Carroll, 4 Ind. App. 112, 122-4, the court said: "Appellant, in fact, offered no evidence upon the matter. No witness was put upon the stand; no question was asked. Nothing was done except a mere conversation or talk had between counsel for appellant and the court. Such procedure as this does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered, and counsel cannot, by engaging in a mere conversation with the court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the court upon which he can predicate error. If appellant desired to make the conversation it now makes, it should have at least put a witness upon the stand and proceeded far enough that the question relative to the point it is now said it was denied to offer evidence upon was raised, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked." In Bowman v. Indian Orchard Tenement District, 212 Ill. App. 507, 509, it was said: "This offer of proof was made before the court had ruled upon the objection to the question and was, therefore, premature. It is not proper to make an offer of proof until the court has sustained an objection to a question propounded for the purpose of eliciting the desired evidence." In Jackson v. Brown, 22 Ill. App. 348, the court said: "Appellants offered to prove the 'allegations of their petition.' This was insufficient. The witnesses should be called and questioned, or documentary evidence produced. A mere statement of an offer to prove is not anything upon which a court is called upon to act." In Nelson v. Miller, 182 Ill. App. 433, 434, it was held that remarks of the court in a discussion with counsel

do not constitute a refusal to admit evidence where no witnesses are questioned and none placed on the stand. The instant offer does not even show by whom or how the proof offered was to be made (Nat'l Bank of Decatur v. Board of Education, 205 Ill. App. 57, 65), nor does it contain a plain statement of the facts the defendant proposed to prove (ib. p. 66), and there is force in the contention of plaintiff that the offer relates to immaterial matters and contains conclusions of law to which the court might properly sustain an objection. (The People v. C., C., C. & St. L. Ry. Co., 270 Ill. 527, 530; Martin v. Hertz, 224 Ill. 84, 88.) "When an offer of proof embraces evidence, a part of which is inadmissible, the whole offer may be rejected. Cressey v. Kimmel, 78 Ill. App. 27." (Harman v. Indian Grave Drainage District, supra, p. 510.) "When the offer of testimony includes that which is admissible with that which is not, and the competent and incompetent are blended together, it is not the duty of the court to separate the legal from the illegal, but the whole may be rejected when objection is made." (Jones on Evidence, 2d Ed. sec. 394. See also The People v. Venard, 158 Ill. App. 254, 260; Riemenschneider v. Riemenschneider, 179 Ill. App. 209, 213; Donnan v. Donnan, 256 Ill. 244.) Moreover, the offer, as made, is insufficient for the reason that it was not enough to prove that the checks in question were "corporate obligations;" but it was also necessary, under paragraph 40, for defendant to prove that he was duly authorized by the corporation to sign checks in its behalf, and the so-called offer of proof does not contain any offer to prove that defendant was an officer or agent of Kennelly & Heffernan, Inc., and that he was duly authorized to sign checks for that corporation, and therefore, for that reason alone, the offer does not establish a defense under paragraph 40 and the action of the court in sustaining an objection to the offer was not error.

do not constitute a refusal to claim privilege where no objections are questioned and none placed on the stand. The instant offer did not even show by whom or how the proof offered was to be made (Hoyt's Manor of Freeport v. Board of Elections, 206 Misc. 1[3], 1[4], 97, 98), nor does it contain a plain statement of the facts the defendant proposed to prove (Id. p. 96), and there is force in the contention of plaintiff that the offer relates to immaterial matters and contains conclusions of law by which the court might properly sustain an objection. (The People v. C., T., E. & H. R. R. Co., 170 Ill. 327, 330; Smith v. Smith, 324 Ill. 84, 88.) "When an offer of proof embraces evidence, a part of which is inadmissible, the whole offer may be rejected." Krasny v. Kinney, 78 Ill. App. 37." (Brown v. Indian River Fishing Co., supra p. 312.) "Then the offer of testimony indicates that which is admissible with that which is not, and the competent and incompetent are blended together, it is not the duty of the court to separate the legal from the illegal, but the whole may be rejected when objection is made." (Jones on Evidence, 2d Ed. sec. 324. See also The People v. Vanzant, 348 Ill. App. 534, 539; Hammerschlag v. Hammerschlag, 177 Ill. App. 329, 332; Brown v. Kinney, 68 Ill. 314.) Therefore, the offer, as made, is inadmissible for the reason that it was not enough to prove that the checks in question were "negotiable original" but it was also necessary, under paragraph 40, for defendant to prove that he was duly authorized by the corporation to sign checks in the bank, and the so-called offer of proof does not contain any offer to prove that defendant was an officer or agent of Kennedy & Mitterman, Inc., and that he was duly authorized to sign checks for that corporation, and therefore, for that reason alone, the offer does not establish a defense under paragraph 40 and the action of the court in sustaining an objection to the offer was not error.

The judgment of the Municipal Court of Chicago is affirmed. Plaintiff, some time since, filed a motion in this court to affirm the judgment of the trial court and we reserved to the final hearing our decision in reference to the same. It is now unnecessary for us to formally pass upon that motion.

JUDGMENT AFFIRMED.

Gridley and Kerner, JJ., concur.

The judgment of the Bankruptcy Court of Ontario is affirmed. Inasmuch as the Court, filed a motion in this court to affirm the judgment of the trial court and to remand to the first hearing our decision in reversing in the case, it is now unnecessary for us to formally grant that motion.

AFFIRMED.

BRIGHT and TUTTLE, Cir. Judges.

34386

PEOPLES' STATE BANK OF ARLINGTON HEIGHTS,

Appellee,

v.

HERMAN F. REDEKER, individually and as executor of the last will of FRIEDRICH REDEKER, deceased, MINA REDEKER, ELEANORE REDEKER and JOHN REDEKER,

Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

261 I.A. 639

MR. JUSTICE SHIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse a decree of the Superior court, entered March 6, 1930. The action was commenced on July 8, 1927. The prayer of complainant's amended bill, filed October 17, 1927, is in substance that an account be taken of the dealings during a certain stated period of Friedrich Redeker and Herman F. Redeker, (hereinafter called the two Redekers) with complainant bank, of which they then were managing officers, and of all sums wrongfully converted by them, and of all losses and damages sustained by complainant by reason of their fraudulent conduct; that defendants be held jointly and severally liable for, and be decreed to pay to complainant, whatever sums shall appear to be due to it on the taking of the account, etc. In the decree, following the master's report made after a lengthy hearing, the court adjudged:

"That this cause be and hereby is again referred to Louis J. Behan, a Master in Chancery of this court, to take and state the account of the parties on all of the items, transactions, misappropriations, listed or shown in complainant's said exhibit 49 as 'Direct Appropriations,' and as 'B', 'B1', 'C' and 'D', with lawful interest thereon, which shall appear to be due from said defendants or any of them to complainant, and to determine the amounts due complainant from the defendants, and from the complainant to defendants, if any, according to their respective liabilities; that in doing so said master shall proceed upon the findings, basis and terms of this decree, the pleadings of the

[illegible]

[illegible]

[illegible]

parties and all the evidence now in the record and such further evidence as may be offered by any of the parties hereto and which shall be material and relevant to such accounting; and that said master report to this Court, with all due speed, such amounts together with such further evidence as may be so offered and received by said master and his conclusions thereof."

In the decree the court overruled all of defendants' exceptions, and also certain of complainant's exceptions, to the master's original report (as redrafted) and to his supplemental report, and confirmed said reports. And the court made the following findings in substance.

That complainant is an Illinois corporation, doing a general banking business at Arlington Heights, Illinois; that Friedrich (also called Frederick) Redeker was the president and one of the directors of the bank from its organization in 1912 until his death in January, 1925, and from January 1, 1920 to December 31, 1924, was also its cashier; that Herman F. Redeker was its secretary from January 1, 1918 to January 1, 1920, and from the last named date to January 1, 1923, its secretary and assistant cashier, and from the last named date to about June 30, 1925, its secretary and cashier; that during all of said time the bank employed the two Redekers by the year and paid each a monthly salary for their services as such officers; that during all of the time from January 1, 1914 to January, 1925, they, as such officers, were actively in charge of the bank, transacted all of its business affairs, had the custody and control of its books, records and papers, and made or caused to be made all of the entries therein; that Herman was Friedrich's son; that during all of the time the directors and stockholders of the bank had implicit confidence in both of them, entrusted them with the management of its business affairs and with the custody of all of its books, etc., relied upon their representations, and believed that they were managing said affairs, and keeping said books, etc., in an honest and proper manner and that the entries in said books, etc., truthfully and properly represented all transactions of the bank.

That on or prior to January 1, 1918, the two Redekers engaged in a conspiracy to defraud the bank of monies belonging to it; that during a period commencing about January 1, 1918 and up to about November 30, 1924, and in pursuance of the conspiracy, they, as officers and employees of the bank, purchased for it and in its name, and from divers brokers, bonds and securities with its funds; that the prices at which the same were purchased from said brokers were falsely and fraudulently entered upon the bank's books and charged to it in amounts in excess of the true prices paid to said brokers; that they wrongfully took, misappropriated and converted to their own use the funds and monies of the bank representing the difference (in some instances a part of the difference) between the prices actually paid to said brokers for the bonds and securities, and the prices at which the same were entered in the books and charged to the bank.

That in the transactions, as shown in complainant's exhibit 49 as "Direct Appropriations," bonds or other securities were purchased

parties and all the witnesses who in the trial and each further evidence as may be adduced to any of the parties hereto and which shall be material and relevant to such accounting; and that such matter report to this Court, with all due speed, such accounts together with such further evidence as may be so offered and received by said master and his conclusions thereof."

In the course the court overruled all of defendants' exceptions, and also certain of complainant's exceptions, to the master's original report (as referred) and to his supplemental report, and confirmed said reports. And the court made the following findings in substance.

That complainant is an Illinois corporation, doing a general banking business at Milligan Building, Illinois; that Friedrich (also spelled Fredrick) Tuebner was the president and one of the directors of the bank from the organization in 1910 until the fall in January, 1921, and from January 1, 1922 to December 31, 1921, was also the cashier; that Jerome T. Tuebner was the assistant cashier during 1, 1921 to January 1, 1922, and from the last named date to January 1, 1921, the assistant and assistant cashier, and from June 30, 1921, the executive and managing officer of said bank during the same respective times; that the defendants, or the year one year each a monthly salary for their services in such capacity; that during all of the time from January 1, 1921 to January, 1922, they, or such officers, were actively in charge of the bank, transacted all of the business attached, and thereby and therein of the bank, receive the profits, and have or cause to be made all of the entries covering that business; that Friedrich, and during that during all of the time the directors and stockholders of the bank had implicit confidence in both of them, entrusted them with the management of the business affairs and with the custody of all of the bonds, etc., relied upon their representations, and believed that they were managing such affairs, and keeping said books, etc., in the lawful and proper manner and that and entries in said books, etc., fraudulently and properly represented all transactions of the bank.

That on or prior to January 1, 1919, the defendants endeavored to defraud the bank of money belonging to it; that during a period commencing about January 1, 1919 and up to about December 31, 1921, and in pursuance of the conspiracy, they, as officers and employees of the bank, purchased for or sold to the bank, diverse securities, bonds and securities with its funds; that the prices at which the same were purchased from said brokers were falsely and fraudulently entered upon the bank's books and charged to it in consideration of the true prices paid to said brokers; that they wrongfully took, misappropriated and converted to their own use the funds and assets of the bank representing the difference (in some instances a part of the difference) between the prices actually paid to said brokers for the bonds and securities, and the prices at which the same were entered in the books and charged to the bank.

That in the [illegible], or there in [illegible] and [illegible] of the [illegible] transactions, bonds or other securities were purchased

for the bank by them as its officers from brokers at amounts less than the sums at which they were charged to the bank, and the difference between the actual purchase price and the amounts at which the same were charged to the bank on its books were credited to their personal deposit accounts, except that in some instances their accounts were credited with but a part of such difference; that other methods of such misappropriations are listed in said exhibit 49 under the heading of "Indirect Appropriations"; and that these so-called indirect appropriations are further classified as "B", "B1", "C" and "D".

That there is listed in exhibit 49, another classification, as Group "A", of which there are 100 items; that these are transactions in which on various dates between January 3, 1918 and June 12, 1924, securities were purchased from various brokers and paid for by drafts drawn by the bank, which drafts were paid for by checks of individual depositors of the bank; that the bonds, listed as Group "A" items, were purchased at a price less than par, and the evidence (upon which complainant relies to justify an account from defendants on these items) consists of the broker's invoice and the draft issued by the bank to the broker; that in each instance the broker's invoice runs to the bank, and contains a brief description of the bonds and the amount due (including accrued interest, if any); that the bank's books disclose that, on the respective dates of these Group "A" transactions, the bank draft in each transaction was paid for by a check or checks drawn on individual checking accounts of depositors in the bank, but complainant offered no evidence as to the identity of the makers of these individual checks; that complainant contends that, upon its having made proof of the facts as last recited, the burden of showing the identity of the persons drawing said individual checks must be assumed by defendant, because at the time of the transactions, the two Redekers were in charge of the bank and were the custodians of its books and records; that complainant also contends that the bonds, so mentioned in the Group "A" items, were paid for with money belonging to the bank, and that the entries in its books of checks, drawn by individual depositors in an amount equal to the amount of the bank drafts, were false and fictitious, and that in fact no bona fide checks were given to or received by the bank in payment of the bank drafts; that complainant further contends that if any individual checks were given in payment of the drafts, such individual checks, shown on the bank's records, were in fact checks by either or both of the two Redekers, and that if the checks were their or either of their checks, no money was actually received by the bank on them; that complainant admits that it is unable to offer any proof as to whose checks were supposedly given in payment of the bank drafts, but insists that the burden of showing the details of each of these transactions is upon the defendants; and that complainant does not claim that defendants, or any of them, are liable to it for the amounts paid to the brokers for these Group "A" bonds, but it does claim that defendants should account to it for the difference between the par value of the bonds and the prices at which they were respectively purchased, because the bonds involved in this grouping were subsequently charged to the bank at par, and the accounts of the two Redekers, or one or the other of them were simultaneously credited with the amount so charged to the bank, - the transactions last specified being shown in exhibit 49 as Group "B1".

That in said Class "B", bonds or securities were purchased from brokers at one price, charged to the bank at a higher price, and the broker's invoice in each instance was paid by a draft of the bank, which draft in turn was supposedly paid by

For the bank by them as the affidavit from Sydney at amounts less than the sums at which they were charged to the bank, and the affidavit evidence for certain payments also the amounts at which the [illegible] in the bank as the books were credited to their principal deposit [illegible], without that in some instances [illegible] with a part of each differences; that other matters of [illegible] explanations are liable in said exhibit to under the heading of "Unknown Payments"; and that those so-called [illegible] explanations are further classified as "B", "BI", "C" and "D".

That Sydney is linked in exhibit 49, another classification, as Group "A", of which there are 130 items; that these are transactions in which on various dates between January 3, 1923 and June 13, 1924, [illegible] were paid-out from various bankers and paid for by drafts drawn by the bank, which drafts were paid for by checks of individual depositors of the bank; that the bank, listed as Group "A" items, was produced at a prior inquiry, and the evidence (upon which complainants relied in justify an account from defendants on these items) consists of the bankers's invoice and the draft issued by the bank; the effect that to such transactions the bankers's invoice is the same, and supplies a brief description of the bank and the amount due (including accrued interest, if any); that the bank's books disclose that, on the respective dates of these Group "A" transactions, the bank held in each transaction was paid for by a check or checks drawn on individual depositing accounts of depositors in the bank, but complainants offered no evidence as to the identity of the makers of these individual checks; that complainants contended that, upon the having and proof of the facts as last recited, the burden of showing the identity of the persons drawing said individual checks must be assumed by defendants, because at the time of the transactions, the two defendants were in charge of the bank and were the managers of its affairs; that defendants also contended that the bank, as a public and individual, was entitled to rely upon the [illegible] in the Group "A" items, were paid for with money belonging to the bank, and that the entries in the books of checks, drawn by individual depositors in an amount equal to the amount of the bank draft, were false and fictitious, and that in fact no such [illegible] checks were given to or received by the bank in payment of its bank drafts; that complainants further contended that if any individual checks were given in payment of the drafts, such individual checks, when on the bank's records, were in fact checks by either or both of the two defendants, and that if the checks were signed or either of their names, or many of them, are liable to it for the amounts paid to the bankers for these Group "A" bonds, but is does claim that defendants should account to it for the difference between the net value of the bonds and the prices at which they were respectively purchased, because the bonds involved in this proceeding were subsequently charged to the bank at par, and the accounts of the two defendants, or one or the other of them, were similarly credited with the amount so charged to the bank, - the transactions last specified being shown in exhibit 49 as Group "B1".

That in said class "B", bonds or securities were purchased from bankers at one price, charged to the bank at a higher price, and the banker's invoice in each instance was paid by a draft of the bank, which draft in turn was supposedly paid by

checks drawn on individual checking accounts, and simultaneously with all of these details there was credited to the deposit accounts of the two Redekers, or of one of them, amounts equal to the sums at which such bonds and interest thereon were charged to the bank.

That in said Class "B1," entries on the bank's books purport to show various purchases of bonds by it, and on the same dates there are amounts credited to the accounts of the two Redekers exactly equal to the amounts purported to have been paid by the bank for such bonds.

That in said Class "C", there are 16 items, of which one is illustrative, viz, that on July 5, 1921, the bank was charged on its books with having paid $3,100 for certain bonds, plus accrued interest, and on the same date the draft of the bank in the sum of $3,010.10, was drawn by the bank and paid to the firm of Bartlett, Knight & Co., in payment of its invoice of the bonds just mentioned; and the difference of $89.90 was not credited to the bank or accounted for on its books, nor was it deposited, apparently, to either of the two Redeker's accounts.

That on January 12, 1925, Friedrich Redeker died testate, leaving a last will in which, after directing the payment of all his just debts, he devised and bequeathed all of his real and personal property to his wife, Mina Redeker, a defendant herein, "to have the full use and control of the same and use as much of the same as she may need during her natural life," and further provided that upon her death all of said real estate and property then remaining should be divided equally among Herman F. Redeker, John H. Redeker and Eleanore Redeker, defendants herein; that on February 24, 1925, the will was duly admitted to probate by the probate court of Cook county, and Herman F. Redeker, therein nominated as executor, was duly appointed as sole executor of the will, and he qualified and thereafter acted as such; that the estate was administered, and closed on December 13, 1926, and the executor then discharged; and that said four defendants, as the only devisees and legatees under the will, received from said estate, in accordance with the terms of the will, valuable real and personal property, remaining after payment of claims allowed against said estate and costs of administration.

That during all of the time aforesaid the two Redekers (Friedrich and Herman) sustained a fiduciary relation to the bank, its directors and stockholders, and fraudulently concealed all of their said misappropriations, etc.; and that prior to March, 1927, neither the bank nor any of its directors or stockholders, other than the two Redekers, had any knowledge that they, or either of them, were or had been guilty of any fraudulent conduct, or that they had misappropriated any monies or funds of the bank.

And the court further found that this action, or the recovery for any of the aforesaid items and misappropriations, is neither barred by the statute of limitations nor by reason of the fact that no claim therefor was filed against the estate of Friedrich Redeker, deceased, within one year from the time that letters of administration were granted; that the material allegations of complainant's amended bill are substantially true, and the equity of the cause is with it; and that complainant is entitled to an accounting from defendants on all the items, transactions and misappropriations listed or shown in said exhibit 49, as "Direct Appropriations" and as "B", "B1", "C" and "D", but that it is not entitled to an accounting on the items under said Class "A".

[illegible] on [illegible] accounting accounts, and [illegible]
with all of them [illegible] there was written in the deposit accounts
of the bankers, or at the [illegible] amounts equal to the sums on
which such [illegible] had [illegible] been charged to the bank.

That is said there "Mr." appears on the bank's books pur-
part to show various payments of checks by it, and on the same dates
there are amounts inscribed to the accounts of the indicated accounts
equal to the amounts purported to have been paid by the bank for such
checks.

That is said there "C", there are 12 items, of which one
is [illegible]-[illegible], etc. On July 5, 1921, the bank was charged
on its books with having paid $6,500 for [illegible] bonds, plus accrued
interest, and on the same date the [illegible] of the bank is the sum of
$5,020.12, was given by the bank and paid on the file of Marillis.
Either a [illegible], in pursuance of its involve of [illegible] [illegible] [illegible]
and the difference of $1,479.70 was not credited to the bank or accounted
for on its books, but was in dispute, apparently, by either of the
two Tedders's accounts.

That on January 12, 1922, Theodore Tedder died testate,
leaving a [illegible] will in which, after directing the payment of all his
just debts, he devised and bequeathed all of his real and personal
property to his wife, Mina Tedder, a [illegible] [illegible], "to have the
full use and control of the same and as much of the same as she
may need during her natural life," and further provided that upon
her death all of said real estate and property then remaining should
be divided equally among Joseph T. Tedder, John T. Tedder and
Sidney Tedder, [illegible] that on February 24, 1922, the
will was duly admitted to probate by the probate court of Cook
county, and [illegible] T. Tedder, the[illegible] qualified as executor, was
duly appointed as sole executor of the will, and he qualified and
thereafter acted under the [illegible] as administrator, and [illegible]
on December 11, 1926, and the executor then discharged; and that said
four [illegible], as the only [illegible] and legatees under the will,
received from said estate, in accordance with the terms of the will,
various real and personal property, receiving after payment of claims
allowed against said estate and costs of administration.

That during all of the time aforesaid the two Tedders
(Sidney and Joseph) maintained a fiduciary relation to the bank,
its directors and stockholders, and fiduciarily commingled all of
their [illegible] [illegible], etc., and then put to [illegible]. That,
neither the bank nor any of its directors or stockholders, either
when the two Tedders, had any knowledge that they, or either of
them, were or had been guilty of any fraudulent conduct, or that
they had misappropriated any monies or funds of the bank.

And the court further found that this action, or the
recovery for any of the aforesaid items and misappropriations,
is barred by the statute of limitations; that [illegible] of
the fact that no claim therefor was filed against the estate of
Sidney Tedder, deceased, within one year from the time that
letters of administration were granted; that the material allegations
of complainant's amended bill are substantially true, and the equity
of the cause is with it; and that complainant is entitled to an
accounting from defendants on all the items, transactions and mis-
appropriations listed or shown in said exhibits "A", as "Mirror
[illegible]" and as "C", "Mr." and "C", but that it is not
entitled to an accounting on the items under said Class "A".

Numerous points are made by counsel for defendants as grounds for a reversal of the decree. It is first contended, inasmuch as it appears that all of the property of Friedrich Redeker was inventoried in the probate court and his estate closed in December, 1926, and as complainant did not within the required time file any claim against said estate, complainant's remedy, under the provisions of section 70 of the Administration Act, is limited to newly discovered assets of Friedrich's estate, and it does not appear that there are any such. We do not think that section 70 has any application to the present case as disclosed from the findings of the decree, which in our opinion are amply sustained by the evidence. This is not an action against the estate of Friedrich Redeker, but one against Herman Redeker (individually and as executor of Friedrich's will) and the other heirs, devisees and legatees of Friedrich. (See Durflinger v. Arnold, 329 Ill. 93, 98; Union Trust Co. v. Shoemaker, 258 Ill. 564, 571; Vaughop v. Bartlett, 165 Ill. 124, 129; Ryan v. Jones, 15 Ill. 1, 6; Straus Bros. Co. v. Bush, 241 Ill. App. 216, 228.) And it was not improper to make Herman a party defendant as such executor, though discharged, as well as in his individual capacity. (Ryan v. Jones, supra; Hoffman v. Welding, 85 Ill. 453, 456; Tinker v. Babcock, 204 Ill. 571, 574.)

Defendants' counsel also contend, inasmuch as the present action was begun on July 8, 1927, and as it appears that the court directed an accounting as to certain items of claimed misappropriations by the two Redekers long prior to July 8, 1922, the decree for an accounting as to such items is erroneous because of the statute of limitations of five years. In our opinion there is no merit in the contention. In section 22 of the Limitations Act (Cahill's Stat., 1929, p. 1672) it is provided: "If a person liable to an

Numerous points are made by counsel for defendants as grounds for a reversal of the decree. It is first contended, inasmuch as it appears that all of the property of Malcolm Andrews was inventoried in the probate court and his estate closed in December, 1958, and no complainant did not within the required time file any claim against said estate, complainant's remedy, under the provisions of section 72 of the administration act, is limited to merely discovered assets of Malcolm's estate, and it does not appear that there are any such. We do not think that section 72 has any application to the present case as distinct from the creditors of the decedent, which is our opinion are amply sustained by the evidence. This is not an action against the estate of Malcolm Andrews, but one against Bruce Andrews individually and as executor of Malcolm's will) and the other heirs, devisees and legatees of Malcolm. (See Duffleman v. Smith, 325 Ill. 69, 89; Dale Trust Co. v. Dawson, 338 Ill. 364, 371; Hughes v. Berlind, 348 Ill. 318, 320; Lyon v. Green, 12 Ill. 1, 4; Pepper Sugar Co. v. Jung, 241 Ill. App. 316, 322.) Nor is we not impressed to make Bruce a party defendant as such executor, though discharged, as well as in his individual capacity. (Lyon v. Jones-Quarry Dalton v. Tolliver, 85 Ill. 139, 142; Tinker v. Mahoney, 324 Ill. 271, 274.)

Defendants' second also contend, inasmuch as the present action was begun on July 3, 1967, and as it appears that the court directed an accounting as to certain items of claimed misappropriations by the two Andrews long prior to July 3, 1962, the decree for an accounting as to such items is erroneous because of the statute of limitations of five years. In our opinion there is no merit in the contention. In section 22 of the limitations act (Smith's Stat., 1969, p. 1072) it is provided: "If a person liable to an

action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has no such cause of action, and not afterwards." The evidence sufficiently shows, and as found by the court, that by affirmative acts the two Redekers fraudulently and effectively concealed from complainant, and its other directors and stockholders, the fact of the various misappropriations, etc., and that prior to March, 1927, (about four months before the present action was begun) neither complainant nor any of said other directors or stockholders had any knowledge of such misappropriations, or of the fraudulent conduct of the two Redekers, and that at the various times of the misappropriations, the two Redekers sustained a fiduciary relationship to complainant and said other directors and stockholders. While it is the law that "the Statute of Limitations does not strictly apply to suits in equity" (Duncan v. Bazey, 318 Ill. 508, 525), still, as said in Greenman v. Greenman, 107 Ill. 404, 411, "equity generally follows the law, and denominates the period that the statute requires to bar an action, laches, that renders a demand stale." And in equity the rule is that, "where a cause of action arises from a fraud, the Statute of Limitations will not begin to run, nor laches apply, until the discovery of the fraud, or from the time when the fraud could have been discovered by the exercise of reasonable diligence; but in the latter case the failure to use diligence is excused where there is a relation of trust and confidence, rendering it the duty of the party committing the fraud to disclose the truth to the other." (Farwell v. Great Western Telegraph Co., 161 Ill. 522, 596, and cases there cited.) And in Duncan v. Bazey, supra, it is said: "There can be no laches where there is no knowledge, and mere delay will not bar relief where the injured party was ignorant of the fraud and filed his bill within a reasonable time after acquiring knowledge of it."

action fraudulently procures the waiver of such notice from the insurance of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has no such cause of action, and not afterwards." The evidence sufficiently shows, and is found by the court, that by affirmative acts the defendant fraudulently and effectively concealed from complainant, and the other directors and stockholders, the fact of the wrongful misappropriations, and that prior to March, 1947, (about four months before the present action was begun) neither complainant nor any of said other directors or stockholders had any knowledge of such misappropriations or of the fraudulent conduct of the two defendants, and that at the various times of the misappropriations, the two defendants maintained a fiduciary relationship to complainant and said other directors and stockholders. While it is the law that "the jurisdiction of chancery here and strictly applies only to equity" (Lawson v. Jones, 112 Ill. App. 488), still, as said in Sherman v. Sherman, 327 Ill. 604, 611, "equity generally follows the law, and consequently the proofs that the statute requires to bar an action, Laches, must render a demand stale." And in equity the rule is that, "where a cause of action arises from a fraud, the statute of limitations will not begin to run, nor Laches apply, until the discovery of the fraud, or from the time when the fraud could have been discovered by the exercise of reasonable diligence; but in the latter case the failure to use diligence is assumed where there is a relation of trust and confidence, rendering it the duty of the party committing the fraud to disclose the truth to the other." (Purcell v. Grand Tronkers Insurance Co., 321 Ill. 327, 329, and cases there cited.) And in Lawson v. Lawson, supra, it is said: "There can be no Laches where there is no knowledge, and mere delay will not bar relief where the injured party was ignorant of the fraud and filed his bill within a reasonable time after acquiring knowledge of it."

Defendants' counsel further contend, inasmuch as the court's finding (that neither complainant nor said other directors and stockholders, prior to March, 1927, had any knowledge of the misappropriations of the two Redekers) is based upon the testimony of four or five directors and stockholders of complainant, that said testimony was erroneously considered by the court because the same was incompetent under section 2 of the Evidence Act (citing Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481, 495; Alberg Commission Co. v. Kessel, 193 Ill. 153, 155.) We do not think there is any substantial merit in the contention. There is other competent testimony in the record showing lack of knowledge in complainant and said other stockholders of said misappropriations prior to March, 1927. Furthermore, the testimony complained of was competent as against the defendant, Herman Redeker, in his individual capacity, and was competent against the defendants, Mina, Eleanore and John Redeker (heirs, legatees and devisees of Friedrich Redeker) as to facts occurring after Friedrich's death. (Sub. Sec. first of Sec. 2, Evidence Act; Griffin v. Griffin, 125 Ill. 430, 434), and could not properly have been excluded on defendants' motions. (Rich v. Sievers, 73 Ill. 194, 196.)

Equally without merit, in our opinion, is the further contention that the court erred in confirming the master's rulings on the hearing in admitting certain testimony of some of complainant's witnesses as to certain admissions of liability to complainant made by Herman Redeker, at a meeting in June, 1927, held at the office of E. F. Laurin (complainant's expert accountant) for the purpose of negotiating a possible settlement or compromise of complainant's claim. In Thom v. Hess, 31 Ill. App. 274, 276, it is said: "Offers of compromise do not bind; but admissions or statements of the facts are evidence, though made in an endeavor to effect a settlement." (See

Defendants' counsel further contend, inasmuch as the lower court's finding that William complained to his wife about strychnine and chloroform, prior to March, 1927, had any knowledge of the misappropriation of the [illegible] by means upon the testimony of four or five witnesses and stockholders of complainant, that said testimony was erroneously considered by the court because the same was incompetent under section 2 of the Evidence Act (citing, Chamberlayne's The Modern Law of Evidence, 2nd Ed., 1911, 1929; Jones Commentaries on Evidence, 2nd Ed., 1914, 1924.) We do not think there is any substantial merit in the contention. There is ample competent testimony in the record showing lack of knowledge in complainant and old other stockholders of said misappropriations prior to March, 1927. Furthermore, the testimony complained of was competent as against the defendants, Thomas Sodaro, in his individual capacity, and not as competent against the defendants, Nina, Eleanore and John Sodaro (Heirs, Deceased) or Trustees of Trustees Sodaro in their capacity as trustees (citing, Bradley v. Bradley, 1 Ch. 1911, 494, and could not prejudicially have been considered as defendants' motions. (Kidd v. Lawson, 76 Ill. 191, 196.)

Equally without merit, in our opinion, is the further contention that the court erred in sustaining the master's ruling on the hearing in admitting certain testimony of some of complainant's witnesses to be certain admissions of liability to complainant made by Thomas Sodaro, at a meeting in June, 1927, held at the office of R. K. Lewis (complainant's auditor) accountant for the purpose of notifying a portion stockholder or complainant's claim. In Lewis v. Hess, 21 Ill. App. 276, 279, it is said: "Offers of compromise or any kind, are admissible or admissible of the fact are evidence, though made in an endeavor to effect a settlement." (See

also 1 Greenl. on Ev. 13th ed., sec. 192; 22 Corpus Juris, p. 315, sec. 349; Kuhn v. Williams, 124 Ill. App. 390, 393.)

Defendants' counsel further contend that the criminal acts, as charged against the two Redekers in the amended bill, were not proven beyond a reasonable doubt. This is a civil action for an accounting. The substance of the charges is, and the court found, that the two Redekers as the managing officials of complainant bank entered into a conspiracy to defraud it out of certain monies and consummated their conspiracy and did defraud it during a certain period by means of certain acts performed by them. In the earlier decisions of our Supreme Court it has been held that where, in a civil case, a "criminal offense" is charged in the pleadings, such offense must be proved beyond a reasonable doubt. (Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 612; McInturff v. Insurance Co., 248 Ill. 92, 99.) But in the comparatively recent case of Rost v. Noble & Co., 316 Ill. 367, 372, it is said: "The rule is universal that in criminal prosecutions the evidence must satisfy the jury of the truth of the charge beyond a reasonable doubt. In general, where civil rights only are involved, the decision must be upon the preponderance of the evidence. The English rule, where the issue is upon a charge of crime made in the pleadings and necessary to be proved to maintain the action or defense, was followed in some of the States but has now generally been abandoned. * * The reason in which the rule seems to have had its origin is applicable only to cases where the charge was of a felony, and in general it is in such cases, only, that the rule has been applied. It will not be extended further but is limited to charges of felony." (See, also, Cooper v. Butt, 254 Ill. App. 445, 460-1; People v. Small, 319 Ill. 437, 481.) In the present case we think that the accounting which was prayed for and decreed has for its basis the conspiracy or misdemeanor, committed by the two Redekers. And we also think that the evidence contained in the present record, as was

also I [illegible], on the 1925 M.L., and, 1923: 22 Jurgue Jur.Ir, p. 312, and, 1927 Ryan v. Fitzjames, 124 III. App. 300, 308.)

Alternatively, counsel for Taylor contend that the unlawful acts, on charges against the two defendants in the amended bill, were but proofs beyond a reasonable doubt. This is a civil action for an accounting. The substance of the charges is, and the court found, that the two defendants on the accounting officials of complainant bank entered into a conspiracy to defraud it out of certain sums and accomplished their conspiracy and did defraud it during a certain period by means of certain acts performed by them. In the earlier decisions of our Supreme Court it has been held that where, in a civil case, a "criminal offense" is charged in the pleadings, such offense must be proved beyond a reasonable doubt. (Phoenix Ins. Co. v. Sherry, 114 Ill. 488, 492; Kalkhoff v. Insurance Co., 158 Ill. 29.) But in the comparatively recent case of Hall v. Noble & Co., 242 Ill. 277, 279, it is said: "The rule is universal that in criminal prosecutions the evidence must satisfy the jury of the guilt of the charge beyond a reasonable doubt; in general, there exist civil rights only and involved, the claims must be upon the preponderance of the evidence. The English rule, where the issue is upon a charge of crime made in the pleadings and necessary to be proved to maintain the action or defense, was followed in some of the States but has now generally been abandoned. . . . The reason in which the rule seems to have had its origin is applicable only in cases where the charge was of a felony, and in general it is in such cases, only, that the rule has been applied. It will not be extended further but is limited to charges of felony." (See, also, Dwyer v. Dale, 206 Ill. App. 448, 450-51; Tuggle v. Tuggle, 320 Ill. 427, 432.) In the present case we think that the evidence which was proved for and showed that for the bank the embezzlement or misappropriation, committed by the two defendants, and we also think that the evidence contained in the present record, as was

saidin the accounting case of People v. Small, supra, "shows, beyond all reasonable doubt, a liability to account" on the part of the defendants herein.

And we do not think there is any substantial merit in defendants' counsels' further contention that the decree is erroneous because being based largely upon complainant's exhibit 49 and certain testimony of the expert accountants, Laurin and Berman, who made certain compilations or schedules from complainant's books and records. The documents from which the compilations were made were in evidence and the witnesses were fully cross-examined. In Le Roy State Bank v. Keenan's Bank, 337 Ill. 173, 181, it is said: "Where the originals consist of numerous documents, books, papers or records which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection, any competent witness who has examined the originals may testify as to such result, provided it is capable of being ascertained by calculation." (See, also, People v. Gerold, 265 Ill. 448, 460; People v. Sawhill, 299 Ill. 393, 403.)

Complainant has assigned certain cross-errors. It is argued that the court erred in not finding and decreeing that defendants should account (1) for the items in said Class or Group "A", and (2) for the salaries paid by complainant to each of the two Redekers "during the time they perpetrated said frauds against it." As to the first contention, after considering the evidence and the arguments of respective counsel thereon, we are of the opinion that the court did not err in denying the accounting as to said items. As to the second contention a sufficient answer is, we think, that in complainant's amended bill it was not sought to recover back any portion of the salaries which had been paid to the two Redekers in the ordinary course of business as officials of complainant.

Our conclusion is that the decree of March 6, 1930, appealed from, should be affirmed and it is so ordered. AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.

sadia the accounting case of Vogels v. Smith, supra, "shows, beyond all reasonable doubt, a liability to account" on the part of the defendants herein.

And we do not think there is any substantial merit in defendants' contention that the facts in evidence herein should bring about judgment upon complainant's exhibit 19 and evidence illustrative of the expert accountants, Martin and Norman, who made certain complications or calculations from complainant's books and records. The documents from which the complications were made were in evidence and the witnesses were fully cross-examined. In the Ivy Book v. Fowler's Estate, 327 Ill. 172, 173, it is said: "Where the originals consist of numerous documents, books, papers or records which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection, any competent witness who has examined the originals may testify as to such result, provided it is capable of being ascertained by calculation." (See, also, Vogels v. Farrah, 328 Ill. 448, 449; Vogels v. Cowell, 328 Ill. 395, 406.)

Complainant's exhibit 19 is a three-sided account. It is argued that the court erred in not finding and decreeing that defendants should account (1) for the items in said Class or Group "A", and (2) for the salaries paid by complainant to each of the two defendants "during the time they performed said trusts against it." As to the first contention, after considering the evidence and the arguments of respective counsel thereon, we are of the opinion that the court did not err in refusing the accounting as to said items. As to the second contention, a qualifying answer is, we think, that in complainant's amended bill it was not sought to recover back any portion of the salaries which had been paid to the two defendants in the ordinary course of business as officials of complainant.

Our conclusion is that the decree of March 6, 1930, appealed from, should be affirmed and it is so ordered.

AFFIRMED.

Jonkins, P. J., and Barnett, J., concur.

34481

SHERIDAN ELECTRIC SIGN SERVICE,
a Corporation,
Plaintiff in Error,

vs.

SAM KERBAN,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

261 I.A. 639

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in contract to recover the sum of $1250, there was a trial without a jury in January, 1929, resulting in the court finding the issues against plaintiff and entering judgment against it for costs.

In plaintiff's statement of claim it is alleged in substance that it was duly organized as an Illinois corporation in March, 1928; that defendant was one of its incorporators and subscribed for 25 shares of its capital stock of the par value of $50 per share,--his subscription being for the total sum of $1250; that during March, 1928, plaintiff issued to defendant its certificates of 25 shares of its stock; that defendant never paid for his subscription or for the stock in money or money's worth; and that he is indebted to plaintiff in the sum of $1250.

In defendant's affidavit of merits he admitted that he had subscribed for the stock and had received from plaintiff two certificates, aggregating 25 shares of its stock, "fully paid and non-assessable;" denied that he had not fully paid for the stock in money or money's worth, or that he was indebted to plaintiff in any sum; alleged that at a duly authorized meeting of plaintiff's directors, held in March, 1928, he turned over to it, in payment of his subscription for the stock, an undivided one-half interest in and to a certain co-partnership, of which he was a member, and the assets thereof; and that plaintiff at said

[illegible] Appellants,

v.

[illegible] Appellees.

[illegible] Appellants,

v.

SAN DIEGO,

Defendant in Error.

[illegible]

OF CALIFORNIA.

[illegible]

[illegible]. MOTION BRIEF MAINTAINED THE OPINION OF THE COURT.

In a first class action in contract to recover the sum of $1250, there was a trial without a jury in January, 1928, resulting in the court finding the issues against plaintiff and entering judgment against it for costs.

It plaintiff's statement of claim it is alleged in substance that it was duly organized as an Illinois corporation in March, 1923; that defendant was one of its incorporators and subscribed for 25 shares of its capital stock of the par value of $50 per share,--his subscription being for the total sum of $1250; that during March, 1923, plaintiff issued to defendant its certificates of 25 shares of its stock; that defendant never paid for his subscription or for his stock in money or money's worth; and that he is indebted to plaintiff in the sum of $1250.

In defendant's affidavit of merits he admitted that he had subscribed for the stock and had received from plaintiff the certificates, amounting to 25 shares of its stock, "fully paid and non-assessable;" denied that he had not fully paid for the stock in money or money's worth, or that he was indebted to plaintiff in any sum; alleged that at a duly authorized meeting of plaintiff's directors, held in March, 1923, he turned over to it, in payment of his subscription for the stock, an undivided one-half interest in and to a certain co-partnership, of which he was a member, and the assets thereof; and that plaintiff at said

meeting accepted said one-half interest and said assets in full payment of defendant's subscription, and has since retained the possession thereof.

On the trial the testimony of defendant, supported by certain documentary evidence and corroborated by the testimony of two other witnesses, tended to sustain the defense as stated in the affidavit of merits. There was no evidence to the contrary introduced by plaintiff. We think it clear from the evidence that the finding and judgment of the court were right. It is urged by plaintiff's counsel that defendant's evidence as to the valuation of the property and assets turned over to the plaintiff corporation in payment of defendant's subscription and of the stock, shows such valuation to have been excessive. Even if this were so, it is not a matter of which plaintiff can complain. It formally accepted said property and assets in full payment of defendant's subscription and of the stock issued to him, and such acceptance is binding upon plaintiff, and as between it and defendant the latter's stock subscription must be considered as fully paid. (Parmelee v. Price, 208 Ill. 544, 554.)

The judgment of the municipal court is affirmed.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.

meeting accepted said one-half interest and said assets in full payment of defendant's subscription, and has since retained the personalty thereof.

In the trial the testimony of defendant, supported by certain documentary evidence and corroborated by the testimony of two other witnesses, tended to sustain the defense as stated in the affidavit of merits. There was no evidence to the contrary introduced by plaintiff. We think it clear from the evidence that the finding and judgment of the court were right. It is urged by plaintiff's counsel that defendant's evidence as to the existence of the property and assets turned over to the plaintiff corporation in payment of defendant's subscription and of the stock, since such transfer is alleged to have been fraudulent, if this were so, it is but a matter of which plaintiff can complain. In fact, the property and assets in full payment of defendant's subscription and of the stock issued to him, and such acceptance is binding upon plaintiff, and no between it and defendant the latter's stock subscription must be considered as fully paid. (Sprague v. Crane, 80 Ill. 544, 546.)

The judgment of the municipal court is affirmed.

AFFIRMED.

Barrett, P. J., and Sears, J., concur.

34499

JOHN EHARDT and
MATHIAS EHARDT,
Plaintiffs in Error,

v.

MAX SUGARMAN,
Defendant in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

261 I.A. 639

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced in November, 1924, there was a second trial without a jury, in June 1928, resulting in the court finding the issues against the plaintiffs, and entering judgment on the finding against them for costs. By the present writ of error they seek to reverse the judgment.

The cause has been before this court on a former appeal from a judgment in favor of the then sole plaintiff, John Ehardt, for $450, rendered upon the verdict of a jury. That judgment was reversed on October 4, 1927, and the cause remanded. (Ehardt v. Sugarman, 245 Ill. App. 625.) No mention is made in the brief of counsel for plaintiffs in error of these former proceedings, and the present praecipe record does not show any proceedings prior to May 3, 1928, when the mandate of this court was filed in the municipal court and the cause there redocketed.

As appears from our former opinion (unpublished), plaintiff on the first trial claimed in substance that in May, 1924, he and defendant entered into an oral contract, whereby he, who then was defendant's tenant of certain premises at 651 North avenue in Chicago, agreed to surrender the possession thereof on June 1, 1924, and defendant, in consideration thereof, agreed to

In a civil action motion in contract, commenced in November, 1924, before one [illegible] trial without a jury, in June 1928, resulting in the court finding the issues against the plaintiff, and entering judgment on the finding against them for costs. By the proceeds said at where they took it previous the judgment.

The cause has been before this court on a former appeal from a judgment in favor of the then sole plaintiff, John Sharpe, for [illegible], rendered upon the verdict of a jury. That judgment was reversed on October 4, 1927, and the cause remanded. (Sharpe v. [illegible], 327 Ill. 479, 481.) No mention is made in the brief of counsel for plaintiffs in error of those former proceedings, and the present pleadings record does not show any proceedings prior to May 3, 1928, when the mandate of this court was filed in the municipal court and the cause there reopened.

As appears from our former opinion (unpublished), plaintiff on the first trial claimed in substance that in May, 1924, he and defendant entered into an oral contract, whereby he, who then was defendant's tenant of certain premises at 831 North avenue in Chicago, agreed to surrender the possession thereof on June 1, 1924, and otherwise, to condition thereof, after it

return to plaintiff $450, theretofore delivered to defendant as a deposit for the rent of the premises for the last two months of the term of a certain written lease; that plaintiff surrendered the premises, but that defendant did not keep the agreement and refused to pay to plaintiff said $450. Defendant's defense on the said first trial was in substance that he never made any such agreement with plaintiff; that plaintiff's tenancy was one from month to month in the conducting of a restaurant business on the premises; that about June 15, 1924, he abandoned the premises and for the reason that he was "losing money in the restaurant business;" and that defendant was not indebted to plaintiff in any sum. It further appears from our former opinion that the verdict and judgment for $450, rendered upon the first trial in favor of plaintiff, were not sustained by the evidence, and for that reason the judgment was reversed and the cause remanded.

After the cause was redocketed in the municipal court, on John Ehardt's motion, Mathias Ehardt, his brother, was made a co-plaintiff with John, and they as plaintiffs on May 4, 1928, filed a second amended statement of claim, which disclosed a different theory of right to recover the $450. In said statement of claim they alleged in substance (1) that on September 8, 1922, defendant, then the owner of the premises, demised them by written lease to one Jacob Andree, for a term commencing October 1, 1922, and ending on September 30, 1925, and that when the lease was signed Andree deposited with defendant $450, as security for the rent for the last two months of the term (August and September, 1925); (2) that during January, 1923, Andree assigned said lease to one Martin Krispin by written assignment; (3) that on May 9, 1923, by agreement between defendant and Krispin, the latter's "lease and tenancy became and were terminated," and plaintiffs (John and Mathias Ehardt) "became and were tenants of the premises by the agreement and consent

return to plaintiff $600, therefore delivered to defendant as a deposit for the rent of the premises for the last two months of the term of a certain written lease; that plaintiff surrendered the premises, but that defendant did not keep the agreement and refused to pay to plaintiff said $600. Defendant's defense on the said first trial was in substance that he never made any such agreement with plaintiff; that plaintiff's tenancy was at first month to month in the commencing of a tentatorent business on the premises; that about June 15, 1924, he abandoned the premises and for the reason that he was "losing money in the tentatorent business" and that defendant was not indebted to plaintiff in any sum. It further appears from our former opinion that the verdict and judgment for $600, rendered upon the first trial in favor of plaintiff, were not sustained by the evidence, and for that reason the judgment was reversed and the cause remanded.

After the cause was redocketed in the municipal court, on John Thorp's motion, Nathan Ehrmann, his trustee, was made a co-plaintiff with John, and they as plaintiffs on May 4, 1928, filed a second amended statement of claim, which disclosed a different theory of right to recover the $600. In said statement of claim they alleged in substance (1) that on September 8, 1923, defendant, from the owner of the premises, claimed title by written lease in one Clara Cohen, for a term commencing October 1, 1923, and ending on September 30, 1928, and that when the lease was signed Andrew Sparkman with defendant (2), as security for the rent for the last two months of the term (August and September, 1928); (3) that during January, 1923, Andrew Sparkman said lease to one Martin Kriegin by written assignment; (4) that on May 9, 1923, by agreement between defendant and Kriegin, the landlord's "lease and tenancy became and were terminated," and plaintiffs (John and Nathan Ehrmann) "became and were tenants of the premises by the agreement and consent

of defendant" (it is not stated what was the character of that tenancy); (4) that on August 30, 1923 (i.e., more than three months after Krispin's lease and tenancy had been terminated), Krispin, by an instrument in writing, assigned to plaintiffs "his said leasehold and all rights thereunder;" and "plaintiffs became and were the actual, bona fide, owners thereof;" (5) that on June 1, 1924, by agreement between defendant and plaintiffs, the latter's tenancy in the premises "was terminated"; and (6) that "by reason of the foregoing matters," defendant is liable to pay to plaintiffs said sum of $450, etc.

In defendant's affidavit of merits, filed May 15, 1928, setting forth his defense to plaintiffs' said different claim, he admitted the allegations as contained in paragraphs 1 and 2 of said second amended statement of claim. As to the allegations of paragraph 3, he admitted that on May 9, 1923, the lease to Andree, which had been assigned to Krispin, was terminated, but alleged that thereafter John and Mathias Ehardt (plaintiffs) became tenants of the premises "from month to month and not by virtue of any lease." As to the allegations of paragraph 4, defendant denied that either on August 30, 1923, or at any other time Krispin assigned his lease of the premises to plaintiffs, and stated the fact to be that "plaintiffs refused to accept an assignment of said lease and refused to be bound thereby." As to the allegations of paragraph 5 of plaintiffs' statement of claim, defendant denied that on June 1, 1924, by his agreement or consent, plaintiffs' tenancy was terminated, and stated the fact to be that on or about June15, 1924, plaintiffs abandoned the premises. And defendant denied that he was indebted to plaintiffs in any sum.

On the trial it appeared from a clear preponderance of the evidence that the allegations in defendant's said affidavit of merits were true. It further appeared that after plaintiffs' abandonment of the premises defendant made unsuccessful attempts to obtain

of defendant" (it is not quoted what was the character of that tenancy); (4) that on August 20, 1920 (i.e., more than three months after Kingsley's death and tenancy had been terminated), Kingsley, by an instrument in writing, assigned to plaintiffs "his and Lessee-hold and all rights thereunder" and "plaintiffs became and were the actual, bona fide, owners thereof"; (5) that on June 1, 1924, by agreement between defendant and plaintiffs, the lessee's tenancy in the premises "was terminated"; and (6) that "by reason of the fore-going matters," defendant is liable to pay to plaintiffs rent of $420, etc.

In defendant's affidavit of merits, filed Sep 12, 1927, setting forth his defense to plaintiffs' said different claim, he admitted the allegations as contained in paragraphs 1 and 2 of said second amended statement of claim. As to the allegations of para-graph 3, he admitted that on May 9, 1920, the lease to Andree, which had been assigned to Kingsley, was terminated, but alleged that thereafter Jean and Beatrice Shorey (plaintiffs) became tenants of the premises "from month to month and not by virtue of any lease". As to the allegations of paragraph 4, defendant denied that either on August 20, 1920, or at any other time Kingsley re-signed his lease of the premises to plaintiffs, and stated the fact to be that "plaintiff returned to accept an assignment of said lease and returned to be bound thereby." As to the allegations of paragraph 5 of plaintiffs' state-ment of claim, defendant denied that on June 1, 1924, by his agreement or consent, plaintiffs' tenancy was terminated, and stated the fact to be that on or about June 18, 1924, plaintiffs abandoned the premises. And defendant denied that he was indebted to plaintiffs in any sum.

In the trial it appeared from a close preponderance of the evidence that the allegations in defendant's said affidavit of merits were true. It further appeared that after plaintiffs' abandon-ment of the premises defendant made unsuccessful attempts to obtain

another tenant and that the premises were not occupied during the months of August and September, 1925.

On the trial also plaintiffs, over defendant's objection, introduced in evidence a certain bill of sale, dated August 30, 1923, wherein Krispin sold to them certain restaurant furniture, fixtures, etc., on the premises, together with "leasehold and all rights thereunder, as well as all liabilities." And plaintiffs' counsel here contend that because of this instrument, and the other facts as shown, plaintiffs are entitled to recover of defendant the $450 which defendant received from Andree, as a deposit and as security as stated, when Andree originally signed the lease in 1922. There is no merit in the contention. If the tenancy of Krispin, assignee of the Andree lease, had before the end of the term of the lease been terminated, against the consent of Krispin or by the fault of defendant (lessor), Krispin might have had a claim to recover back from defendant said deposit. But the evidence shows that Krispin wanted to get rid of the assigned lease before the end of the term. And there is no evidence that Krispin ever claimed that he, as assignee of Andree, was entitled to recover back said deposit. Furthermore, the evidence shows that about the time said assigned lease was terminated, plaintiffs would not accept a further assignment to them of said lease, or agree to become bound by its terms, but that they did become tenants of the premises from month to month by a new arrangement with defendant, - a tenancy not connected with the former Andree-Krispin lease.

Under the pleadings and the facts as disclosed from the evidence we are of the opinion that the judgment in question in favor of defendant was clearly right and should be affirmed. Such will be the order.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.

another lessee and that the premises were not occupied during the months of August and September, 1922.

On the trial the plaintiffs, over defendant's objection, introduced in evidence a certain bill of sale, dated August 30, 1922, wherein Kilgore sold to them certain restaurant furniture, fixtures, etc., on the premises, together with "leasehold and all rights thereunder, as well as all liabilities." The plaintiffs' counsel here contend that because of this instrument, and the other facts as shown, plaintiffs are entitled to recover of defendant the rent which defendant received from Andree, as a deposit and as security as stated, since Andree originally signed the lease in 1922. There is no merit in the contention. If the tenancy of Kilgore, assignee of the Andree lease, had before the end of the term of the lease been terminated, against the consent of Kilgore or by the fault of defendant (lessor), Kilgore might have had a claim to recover back from defendant said deposit. But the evidence shows that Kilgore remained in full rid of the assigned lease before the end of the term. And there is no evidence that Kilgore was claiming that he, as assignee of Andree, was entitled to recover back said deposit. Furthermore, the evidence shows that about the time said assigned lease was terminated, plaintiffs sought not either another assignment to them of said lease, or agree to become bound by its terms, but that they did become tenants of the premises from month to month by a new arrangement with defendant, - a tenancy not connected with the former Andree-Kilgore lease.

Under the pleadings and the facts as disclosed from the evidence we are of the opinion that the judgment in question in favor of defendant was clearly right and should be affirmed. Such will be the order.

CONCUR.

Hanson, P. J., and Barker, J., concur.

34528

MAX LOWELL CABLE and
ALEX H. SPITZ, doing business
as CABLE & SPITZ,
Appellees,

v.

C. C. DOBROTH and R. DOBROTH,
doing business as R. DOBROTH
& CO.,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

261 I.A. 639

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract to recover for services rendered by plaintiffs as licensed architects, there was a trial without a jury in April, 1930, resulting in the court finding the issues against defendants and assessing plaintiffs' damages at the sum of $585, the full amount of their claim. Judgment on the finding was rendered against defendants in said sum and they appealed. Plaintiffs have neither entered their appearance nor filed a brief in this court.

On the trial both of the plaintiffs testified and another witness for them. Plaintiffs' evidence disclosed in substance, as alleged in their amended statement of claim, that in March, April and May, 1929, they were licensed architects in Illinois, practicing their profession in Chicago; that in March, 1929, at the request of both defendants they prepared, drafted and delivered to defendants sketches and plans for an apartment building to be erected on a lot on Kimball avenue, just north of Hollywood avenue, Chicago; that the reasonable value of their services in preparing and drafting said sketches and plans is $455; that in April or May, 1929, at the further request of both defendants, they prepared, drafted and delivered to defendants preliminary sketches for another apartment building to be

MAX LUDWIG CLARK and
ELMER E. LUCAS, doing business
as CLARK & LUCAS,

Appellees,

v.

C. W. CHAMBERS and F. [illegible],
doing business as F. [illegible]
& CO.,

Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

Mr. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

In a jury-waived action in contract to recover for architect services by plaintiffs as licensed architects, there was a trial without a jury in April, 1930, resulting in the court finding the issues against defendants and assessing plaintiffs' damages at the sum of $380, the full amount of their claim. Judgment on the finding was rendered against defendants in said sum and they appealed. Plaintiffs have neither entered their appearance nor filed a brief in this court.

On the trial both of the plaintiffs testified and another witness for them. Plaintiffs' evidence disclosed in substance, as alleged in their amended statement of claim, that in March, April and May, 1929, they were licensed architects in Illinois, practicing their profession in Chicago; that in March, 1929, at the request of both defendants they prepared, drafted and delivered to defendants sketches and plans for an apartment building to be erected on a lot on Blackhawk street, just north of Halsted street, Chicago; that the reasonable value of their services in preparing and drafting said sketches and plans is $380; that in April or May, 1929, at the further request of both defendants, they prepared, drafted and delivered to defendants preliminary sketches for another apartment building to be

erected at the northeast corner of Cullom and Ashland avenues, Chicago; that the reasonable value of the services in preparing and drafting said last mentioned sketches is $130; and that defendants are indebted to them in the aggregate sum of $585 - no part of which has been paid.

In defendants' amended affidavit of merits they did not allege that plaintiffs had not performed the services as stated, or that the reasonable value of the same was not as stated, or that plaintiffs were not at the times mentioned licensed architects. Their defense was in substance that plaintiffs under the oral agreement were not to receive anything for their services unless certain clients of defendants accepted said plans and sketches, in which event the clients, and not defendants, were to pay plaintiffs for their work.

On the trial, to sustain the defense, both defendants and another witness called by them testified. But it is clear to us, after reading their testimony, as well as certain testimony introduced by plaintiffs in rebuttal, and after considering all the evidence, that the defense was not sustained, and that the trial court properly made the finding and entered the judgment in question.

Defendants' counsel also here contend for the first time that the judgment should be reversed because (1) it does not sufficiently appear that at the time plaintiffs service were rendered both of them were licensed architects and (2) there is a fatal non-joinder of a party defendant, to-wit, one Edward W. Dobroth, who, it is claimed, was a member of defendants' firm of R. Dobroth & Co., when plaintiffs' services were solicited and performed. In our opinion neither contention is warranted by the evidence. Furthermore, as to the second contention, it sufficiently appears that the oral agreement sued upon was made with plaintiffs by C. O. Dobroth and R. Dobroth, defendants.

The judgment of the municipal court should be and is affirmed.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.

occurred at the northeast corner of Willow and Lombard avenues.

Charged that the reasonable value of the services in preparing and verifying paid last mentioned statements is $750; and that defendants are indebted to them in the aggregate sum of $2880 - no part of which has been paid.

In defendants' amended affidavit of merits they did not allege that plaintiffs had not performed the services as stated, or that the reasonable value of the same was not as stated, or that plaintiffs were not at the times mentioned licensed architects. Their defense was in substance that plaintiffs under the oral agreement were not to receive anything for their services unless certain clients of defendants accepted said plans and specifications, in which event the clients, and not defendants, were to pay plaintiffs for their work.

In the trial, to sustain the defense, both defendants and another witness testified by deposition. But it is clear to us, after reading their testimony, as well as certain testimony introduced by plaintiffs in rebuttal, one after considering all the evidence, that the defense was not sustained, and that the trial court properly made the finding and entered the judgment in question.

Defendants' counsel also have contended for the first time that the judgment should be reversed because (1) it does not sufficiently appear that at the time plaintiffs' services were rendered both of them were licensed -architects and (2) there is a total non-joinder of a party defendant, to-wit, one Edward W. Dorroth, who, it is claimed, was a member of defendants' firm of R. Dorroth & Co., when plaintiffs' services were solicited and performed. In our opinion neither contention is warranted by the evidence. Furthermore, as to the second contention, it sufficiently appears that the oral agreement upon which suit is brought by R. Dorroth and J. Dorroth, defendants.

The judgment of the municipal court should be and is affirmed.

-Dorroth, P. J., and Burke, J., concur.

ATTEST:

34554

16 A

HELEN BRUNSWICKI,
Plaintiff in Error,

v.

VICTOR MEAMOND,
Defendant in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

261 I.A. 639

MR. JUSTICE GNIBLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff in an automobile accident early in the evening of August 1, 1928, there was a trial before a jury in February, 1930, resulting in a verdict and judgment in favor of defendant. By this writ of error plaintiff seeks to reverse the judgment.

Plaintiff alleged in her declaration in substance that on the evening mentioned defendant was driving his automobile at a dangerous rate of speed, northerly in Cicero avenue, Chicago, attempting to cross Roscoe street (an east and west street); that at the same time she was riding, with all due care for her own safety, with her husband and others in another automobile owned by her husband; that her minor son was driving said last mentioned automobile with due care and caution easterly on Roscoe street and attempting to cross Cicero avenue; that defendant so negligently operated his automobile that it ran into the automobile, in which plaintiff was riding, in the intersection of said two streets, and that as a result of the collision she suffered serious and permanent injuries, etc. Defendant pleaded the general issue.

On the trial much testimony was heard. Plaintiff testified in her own behalf and she called as witnesses her said son and two other occupants of the car in which she was riding. They all gave their versions of the accident, as did another of her witnesses,

[illegible]

[illegible]

Plaintiff in error,

v.

VICTOR MEANORD,

Defendant in error.

[illegible]

MR. JUSTICE DICKEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff in an automobile accident early in the evening of [illegible] 1919, where one a trial before a jury in February, 1920, resulting in a verdict and judgment in favor of defendant. By this writ of error plaintiff seeks to reverse the judgment.

Plaintiff alleged in her declaration in substance that on the evening aforesaid she driving his automobile at a [illegible] rate of speed, northerly in Storrs avenue, Chicago, attempting to cross Clarke street (an east and west street) that at the time she was injured, she was the sole occupant of the car, with her husband and children in another automobile behind her; that her husband was driving his automobile with due care and caution westerly on Rogers street and attempting to cross Clarke avenue that defendant so negligently operated his automobile that it ran into the automobile in which plaintiff was riding, in the intersection of said streets, and that as a result of the collision she suffered serious and permanent injuries, etc. Defendant pleaded the general issue.

At the trial each witness was heard. Plaintiff testified in her own behalf and she called as witnesses her husband and two other occupants of the car in which she was riding. They all gave their versions of the accident, as did another of her witnesses.

Emil C. Schmid, a bystander. Dr. Comes, a physician, also testified for her as to the extent of her injuries and his treatment of her in a hospital. Defendant also testified and he called as witnesses for him George Lomax and Bernard Lemke, who were in a third automobile following defendant's at the time of the collision.

The main contention of plaintiff's counsel is that the verdict and judgment are manifestly against the weight of the evidence. This contention need not be considered by us. It does not appear from the bill of exceptions that any motion for a new trial was made by plaintiff or that the trial court made any ruling on such a motion. In People v. Gabrys, 329 Ill. 101, 102-3, it is said: "In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict it is necessary that the losing party make a motion for a new trial and upon its being overruled except as to such ruling, and to include such motion, the order overruling the same and exceptions thereto, together with the evidence, in a bill of exceptions." (See, also, Yerber v. Chicago and Alton Ry. Co., 235 Ill. 589, 597; Quillman v. Cockram, 253 Ill. App. 413, 414.)

It is also contended that the court erred in giving defendant's instructions, Nos. 3, 4 and 7. The instructions given by the court to the jury are not set forth in the abstract, and, hence, the contention need not be considered by us. Even where complained of instructions are contained in the abstract but other given instructions are not set out therein, such complained of instructions may not be considered. (Briggs v. Page, 222 Ill. App. 223, 227; City of Roodhouse v. Christian, 138 Ill. 137, 141; People v. Heywood, 321 Ill. 380, 384.)

It is further contended that the court erred in refusing to admit in evidence certain X-ray pictures of plaintiff, offered by her. It is not disclosed from the bill of exceptions that said pictures, when offered and objected to, had properly been identified

Emil G. Schmid, a bystander. Dr. Hamer, a physician, also testified for her as to the extent of her injuries and his treatment of her in a hospital. Defendant also testified and he called as witnesses Ira Hughes Lemmex and Howard Lemmex, who were in a third automobile following defendant's at the time of the collision.

The main contention of plaintiff's counsel is that the verdict and judgment are manifestly against the weight of the evidence. This contention need not be considered by us. It does not appear from the bill of exceptions that any motion for a new trial was made by plaintiff or that the trial court made any ruling on such a motion. In People v. Gaborne, 339 Ill. 101, 108-9, it is said: "In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict it is necessary that the lower court make a motion for a new trial and upon its being overruled enough so to such ruling, and to include such motion, the order overruling the same and exceptions thereto, together with the evidence, in a bill of exceptions." (See, also, Kocher v. Chicago and Alton Ry. Co., 327 Ill. 108, 109; Williams v. Gardner, 98 Ill. App. 112, 114.)

It is also contended that the court erred in giving defendant's instructions, No. 3, 4 and 7. The instructions given by the court to the jury are not part of the abstract, and, hence, the contention need not be considered by us. Even where complaints of instructions are contained in the abstract but other given instructions are not set out therein, such complaint of instructions may not be considered. (Bilodgo v. Tom, 333 Ill. App. 324, 327; City of Bloomington v. Christian, 318 Ill. 147, 149; People v. Bowman, 341 Ill. 490, 494.)

It is further contended that the court erred in refusing to admit in evidence certain 4-up pictures of plaintiff, offered by her. It is not disclosed from the bill of exceptions that such pictures, when offered and objected to, had previously been identified

or proved, and the court did not err in the ruling. (Stevens v. Illinois Central R. Co., 306 Ill. 370, 375; Hicks v. Cuneo-Henneberry Co., 319 Ill. 344, 348.)

The judgment of the Superior court is affirmed.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.

or lessees, nor the lessor did not act in the matter. [illegible] Illinois Central R. Co., 80 Ill. App. 192; [illegible] Bannerman, 114 Ill. 501, 502.]

The judgment of the superior court is affirmed.

AFFIRMED.

[illegible] P. J., and [illegible], J., concur.

34566

JOHN WESTWOOD,
Defendant in Error,

v.

ROSE BODINGTON,
Plaintiff in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

261 I.A. 640

MR. JUSTICE SHILLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error Rose Bodington seeks to reverse a decree entered by the Superior court on May 7, 1930. This is the second time the case has been before us. No certificate of evidence is contained in the present transcript.

The action was begun on June 26, 1924. An amended bill for an accounting was filed on December 18, 1925, in which complainant prayed inter alia that defendant be ordered to return ten certain shares of stock, or to pay to him the fair market value thereof, with legal interest thereon, from April 20, 1924. After answer filed there was a hearing before the chancellor, at which both parties introduced evidence. On February 20, 1926, the court entered a decree directing that she pay to complainant within 20 days the sum of $2650, with legal interest from April 20, 1924, to December 16, 1925, and costs of suit, and that in default of such payment execution issue, etc. In the decree the court found that the parties entered into an agreement to purchase certain real estate in Oak Park, Illinois; that the ten shares of stock then were owned by Westwood, and he transferred the same to Mrs. Bodington "as security" for the making of the initial payment for said real estate; that subsequently she rescinded the agreement of purchase and converted the stock to her own use; that its value at the time of the conversion was $2650; that she is still in possession thereof and

version was $8000; that she is still in possession thereof and the stock to her own use; that its value at the time of the conversion was $8000; that she is still in possession thereof and a decree entered by the Superior court on May 7, 1920. This is the second time the case has been before us. No certificate of evidence is contained in the present transcript.

The action was begun on June 26, 1919. An amended bill for an accounting was filed on December 16, 1920, in which complaint prayed inter alia that defendant be ordered to return ten certain shares of stock, or to pay to him the fair market value thereof, with legal interest thereon, from April 30, 1918. After answer filed there was a hearing before the chancellor, at which with parties interested evidence. On February 20, 1922, the court entered a decree directing that she pay to complainant within 20 days the sum of $8000, with legal interest from April 30, 1918, to December 16, 1920, and costs of suit, and that in default of such payment execution issue, etc. In the decree the court found that the parties entered into an agreement to purchase certain real estate in Oak Park, Illinois; that the ten shares of stock then were owned by Tomlinson, and he transferred the same to Mrs. Hodgkins "as security" for the making of the initial payment for said real estate; that subsequently she rescinded the agreement of purchase and converted the stock to her own use; that its value at the time of the con-

refuses either to return the same or to account to him for its value; and that he is entitled to legal interest on the sum of $2650 from April 20, 1924, to December 16, 1925. She appealed to this court, and on March 29, 1927, we reversed the decree and remanded the cause "with directions for a modification of the decree" as outlined in our opinion (not published). (Westwood v. Bodington, 244 Ill. App. 640.) The application for a writ of certiorari was denied (244 Ill. App. p. xviii.)

In the opinion we said that the main fact in controversy was whether, at the time the stock was transferred to defendant, there was any such agreement between the parties as contended by complainant; that on the hearing complainant, as well as his son, Tracy, and the latter's wife (who claimed to be present at the time of the conversation about the purchase), testified that there was such an agreement, and that defendant and her daughter (who also claimed to be present at such conversation) testified that no such agreement was made, and that the stock had been "given" to defendant in accordance with complainant's previously expressed intention; that whether there was such an agreement or such a gift depended entirely upon the chancellor's view of the credibility of the witnesses; that "as he had a better opportunity than we for determining their credibility we find no good reason for questioning the correctness of his conclusion that there was such an agreement and that the stock was assigned to her to be held as collateral, and not as a gift;" that complainant was entitled on his demand made on April 20, 1924, either to have the stock reassigned to him by defendant, or, upon her refusal so to do, to receive its market value as of that date; that the decree is not, however, in such alternative, but orders defendant to pay to complainant within a certain time the sum of $2650, etc., without giving defendant the opportunity of

refusal either to return the same or to account to him for its value) and thus be in entitled to legal interest on the sum of [illegible] from [illegible], 1911, to December 1, 1912. The appeal to this court, and on March 29, 1927, we reversed the decree and remanded the cause "with directions for a modification of the decree" as outlined in our opinion (not published). (Redmond v. Hodgington, 244 Ill. App. 590.) The application for a writ of certiorari was denied (244 Ill. App. p. xviii.)

In the opinion we said that the main fact in controversy was whether, at the time the check was transferred to defendant, there was any such agreement between the parties as contended by complainant; that on the hearing complainant, as well as his son, Tracy, and the latter's wife (who claimed to be present at the time of the transfer) testified that there was such an agreement, and that defendant and her daughter (who also claimed to be present at such conversation) testified that no such agreement was made, and that the check had been "given" to defendant in accordance with complainant's previously expressed intention; that whether there was such an agreement or such a gift depended entirely upon the chancellor's view of the credibility of the witnesses; that "we had a better opportunity than we for determining their credibility" and that we had no good reason for questioning the correctness of his conclusion that there was such an agreement and that the check was delivered to her to be held as collateral, and not as a gift; that complainant was entitled on his demand made on April 20, 1911, either to have the check reassigned to him by defendant, or, upon her refusal so to do, to receive its market value as of that date; that the decree is not, however, in such alternative, but orders defendant to pay to complainant within a certain time the sum of [illegible], [illegible] giving [illegible] the approximately of

reassigning the stock to him; that solely on account of this error the decree should be reversed and the cause remanded with directions to the court to make a proper modification in the decree; and that such modified decree should direct that defendant should reassign and deliver the stock to complainant, or, upon her failure so to do within a specified time, that she pay to him the value of the stock with interest, etc., together with the amount of dividends received thereon.

It thus appears that this court in effect affirmed the former decree of the Superior court of February 20, 1926, as to the issues between the parties, and only directed its proper modification.

After the cause had been redocketed, the Superior court on July 8, 1927, in accordance with the mandate, entered a modified decree in which it ordered that defendant reassign and deliver to complainant said ten shares of stock within 5 days, and that in case of her failure so to do she pay to him within 10 days thereafter the sum of $3650, together with legal interest from April 20, 1924, to June 28, 1927, and also pay the further sum of $100, received by her as dividends on the stock.

On January 30, 1930 (after more than two years had passed) complainant filed a petition in the cause alleging that defendant had failed to comply with the provisions of said modified decree, either by reassigning the stock or paying said sums. He prayed for another decree "making said judgment final for the total sum of $3426.95." Defendant filed a lengthy answer to the petition, and complainant a replication.

On May 7, 1930, the court entered a further decree, finding that defendant has failed and refuses to reassign to complainant said ten shares of stock, mentioned in the decree of July 8, 1927, that she also has failed and refuses to pay to him said sum of $3650, with interest from April 20, 1924, that she also has failed and re-

[illegible] the stock to Mrs. Shaw solely on account of this error. The issue should be resolved and the case remanded with directions to the court to make a proper modification in the decree; and that such modification should insist that defendants should transfer and deliver the stock to complainant, or, upon her failure so to do within a specified time, that she pay to him the value of the stock with interest, etc., together with the amount of dividends received thereon.

It thus appears that this court in effect affirmed the former decree of the Superior court of February 20, 1926, as to the issues between the parties, and only directed the proper modification.

After the cause had been remanded, the Superior court on July 1, 1927, in accordance with the mandate, entered a modified decree in which it ordered that defendants transfer and deliver to complainant sixty shares of stock within 2 days, and that in case of her failure so to do she pay to him within 10 days thereafter the sum of $2000, together with legal interest from April 20, 1924, to June 26, 1927, and also pay the further sum of $100, received by her as dividends on the stock.

On January 20, 1928 (after more than two years had passed) complainant filed a petition in the same pending case referred to, but failed to comply with the provisions of said modified decree, either by transferring the stock or paying said sum. No appeal for another decree "making said judgment final for the total sum of $2021.00." Defendant filed a Demurrer to the petition, but Superior Court sustained a [illegible].

On May 7, 1929, the court entered a further decree, finding that defendant had failed and refused to transfer to complainant said ten shares of stock, mentioned in the decree of July 8, 1927, that she also has failed and refuses to pay to him said sum of $2000, with interest from April 20, 1924, that she also has failed and re-

fuses to pay to him the further sum of $100 as accrued dividends on the stock, and that there is now due to him from her the total sum of $3426.90, together with costs, etc. And the court ordered and decreed that a "final decree" be entered against defendant, in favor of complainant, for $3426.90, and that execution issue, etc.

Defendant's counsel, in urging the reversal of the decree of May 7, 1930, questions the jurisdiction of the court, as a court of equity, to enter it. While not objecting to the amount of the decree, he argues that it is merely one for the payment of money and that defendant is entitled to a jury trial in a law court, etc. In our opinion there is no merit in the point. A proper case for equitable relief was shown in complainant's amended bill and after a full hearing the court decided that the ten shares of stock of the value of $2650, in the possession of defendant, belonged to complainant and should be returned to him, or, if not returned, that defendant should pay to him said sum of $2650, together with certain interest and the amount of certain dividends received by her on the stock. That decision, as evidenced by the original decree of February 20, 1926, was in effect affirmed by this court, though the cause was remanded for the making of a modification in the decree. After the properly modified decree of July 8, 1927 was entered, it appears that defendant failed and refused to return the stock to complainant. Under the decree of July 8, 1927, which we consider a final one, it became an adjudicated fact that defendant, having failed to return the stock, owed complainant said sum of $2650, interest, etc., and $100 for dividends received. The decree of May 7, 1930, is based upon the decree of July 8, 1927, and it determined the total amount of defendant's indebtedness to complainant as of its date. And we regard the errors assigned on the record, and counsel's further points, as an attempt to re-

[illegible] in per is the date judgment was at $100 on a minus stockholdings.
on the above, and that a date is not in the [illegible] for the total
was at $[illegible], [illegible] $[illegible], etc. [illegible] the court entered
and directed that a "final decree" be entered against defendants,
in lieu of complainant, for $[illegible], and that everything issue, etc.
Defendant's counsel, in urging the reversal of the
decree of Oct. 7, 1955, questions the jurisdiction of the court,
on a count of equity, to enter it. While not objecting to the
amount of the decree, he argues that it is merely one for the pay-
ment of money and that a defendant is entitled to a jury trial in a
law court, etc. In our opinion there is no merit in the point.
Proper cause for equitable relief was shown in complainant's amended
bill and also a full hearing was held at which the two sides
of stock of the value of $[illegible], in the possession of defendant, be-
longed to complainant and should be returned to him, or, if not re-
turned, that defendant should pay to him said sum of $[illegible], together
with certain interest and the amount of certain dividends received
by her on the stock. That decision, as evidenced by the original
decree of February 20, 1956, was in effect affirmed by this court,
though the cause was remanded for the making of a modification in
the decree. After the property mentioned decree of July 6, 1957
was entered, it appears that defendant failed and refused to return
the stock to complainant. Under the decree of July 6, 1957, which
we consider a final one, it became adjudicated that that defend-
ant, having failed to return the stock, owed complainant said sum
of $[illegible], interest, etc., and $100 for dividends received. The
decree of May 7, 1959, in issued upon the decree of July 6, 1957,
and it determined the total amount of defendant's indebtedness to
complainant as of the date. And we regard the errors assigned on
the record, and counsel's further points, as an attempt to re-

litigate questions which have finally been adjudicated. In Wabash, etc. R. Co. v. Peterson, 115 Ill. 597, it is held in substance that matters decided by an appellate court on appeal or writ of error cannot be re-examined in the same court on a subsequent writ of error brought on the same record. In Tribune Co. v. Emery Motor Livery Co., 338 Ill. 537, 541, it is said: "There must be an end to litigation, and where a cause has been decided in the appellate court on appeal or writ of error, that court will not review its former decision, in respect of matters which were, or might have been, assigned for error upon the record then before the court. * * * All such matters are regarded as res adjudicata."

The decree of the Superior court of May 7, 1930, should be affirmed and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.

litigant questions which have finally been adjudicated. In Tabor, etc. Co. v. Pittsburgh, 113 Ill. 197, it is held in substance that matters limited by an appellate court on appeal or writ of error cannot be re-examined in the same court on a subsequent writ of error brought in the same record. In Tribune Co. v. Henry Meier Brewery Co., 306 Ill. 307, 309, it is said: "Their duty is to be but to litigation, and where a case has been decided in the appellate court on appeal or writ of error, that court will not review its former decision, in respect of matters also very, or might have been, subject for error upon the record then before the court. * * * All such matters are considered as res adjudicata."

The decree of the superior court of May 7, 1930, should be affirmed and it is so ordered.

APPEARED.

Conley, P. J., and Kerner, J., concur.

34573

HARRY ENGLESTEIN,
Plaintiff and Appellee,

v.

DR. SIMMONS C. HAMILTON and
DR. CLARENCE H. PAYNE,
Defendants,

On appeal of DR. SIMMONS C.
HAMILTON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

261 I.A. 640

MR. JUSTICE SNIDLEY DELIVERED THE OPINION OF THE COURT.

On November 8, 1929, a judgment by confession for $466.49 was entered against the two defendants for rent, etc., claimed to be due on a written lease. On March 10, 1930, on motion of one of the defendants (Dr. Hamilton), the judgment was opened and he was given leave to file an affidavit of merits, which was filed as well as his written demand for a trial before a jury. On April 30, 1930, such a trial was had, and at the conclusion of defendants' evidence, the court directed the jury to return a verdict, finding that at the date of the rendition of the confessed judgment there was due to plaintiff from said defendants the sum of $383. The jury returned such a verdict and on May 3, 1930, the court adjudged that the confessed judgment be reduced to the sum of $383, and that the same, as so reduced, stand confirmed, etc., against both defendants as of the date of its rendition. From this judgment the defendant, Dr. Hamilton, appealed.

A copy of the lease was attached to plaintiff's statement of claim and the original lease, dated April 11, 1928, was introduced by him on the trial. By it plaintiff demised to defendants (naming them), as "lessee", the office space on the third floor of the building on the southeast corner of 47th street and South Parkway,

[illegible]

[illegible]

[illegible]

v.

[illegible] C. HAMILTON and
[illegible] H. [illegible],
Defendants.

On appeal of [illegible] C.
[illegible],
Appellees.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

On November 8, 1938, a judgment by confession for $[illegible] was entered against the defendants for rent, etc., claimed to be due as a valid lease. On March 10, 1930, on motion of one of the defendants (Mr. Hamilton), the judgment was opened and he was given leave to file an affidavit of merits, which was filed as well as his written demand for a trial before a jury. On April 30, 1930, such a trial was had, and at the conclusion of defendants' evidence, the court directed the jury to return a verdict, finding that at the date of the rendition of the confessed judgment there was due to plaintiff from said defendants the sum of $[illegible]. The jury returned such a verdict and on May 2, 1930, the court adjudged that the confessed judgment be reduced to the sum of $[illegible], and that the same, as so reduced, stand confirmed, etc., against both defendants as of the date of its rendition. From this judgment the defendant, Mr. Hamilton, appealed.

A copy of the lease was attached to plaintiff's statement of claim and the original lease, dated April 11, 1928, was introduced by him on the trial. By its plaintiff demised to defendants (naming them), as "lessees", the office space on the third floor of the building on the southwest corner of 47th street and South Parkway,

Chicago, described as offices numbered 314, 316 and 318, * * to be occupied for dentist's and physician's offices." The term of the lease was from April 1, 1928, to April 30, 1930, and the stipulated monthly rental was $138, to be paid in advance on the first day of each and every month. By a clause in the lease the lessor (plaintiff) "agrees to furnish steam heat as per the ninth paragraph," in which paragraph it is provided that "Lessor shall furnish to Lessee in the radiators a reasonable amount of hot water heat or steam heat at reasonable hours, if the weather and temperature require it, from the 1st day of October until the 30th day of April of the succeeding year for the use of the Lessee, except when prevented by strike," etc.

The amount of the confessed judgment was made up of a balance of rent claimed to be due for the month of September, 1929, $107; rent for October, $138; and rent for November, $138. These items aggregated $383. In addition there were items aggregating $23.49, for water tax and electric current, and $60 for attorney's fees. These last mentioned items were waived by plaintiff on the trial, but plaintiff made proof that at the time the judgment was confessed there was due under the lease for accrued rent said aggregate sum of $383.

In Dr. Hamilton's affidavit of merits he admitted the execution of the lease and the occupancy of the demised premises by him and his co-tenant for a portion of the term. And he alleged that on some occasions, "to-wit, all of the months of November and December, 1928, and January, February, March and April, 1929," plaintiff failed to furnish sufficient heat to the premises; that "in January, 1929," after receiving notice of insufficient heat, plaintiff "cut through the wall and ran an exposed steam pipe through affiant's operating room," against affiant's consent,

Chicago, described as offices numbered 314, 316 and 318, " " to be occupied for dentist's and physician's offices." The term of the lease was from April 1, 1929, to April 30, 1930, and the stipulated monthly rental was $138, to be paid in advance on the first day of each and every month. By a clause in the lease the lessor (plaintiff) "agrees to furnish steam heat as per the ninth paragraph," in which paragraph it is provided that "lessor shall furnish to lessee in the radiators a reasonable amount of hot water heat or steam heat at reasonable hours, if the weather and temperature require it, from the 1st day of October until the 30th day of April of the succeeding year for the use of the lessee, except when prevented by strike," etc.

The amount of the contested judgment was made up of a balance of rent claimed to be due for the month of September, 1929, $147; rent for October, $147; and rent for November, $138. There items aggregated $432. In addition there were items amounting $23.49, for water tax and electric current, and $50 for attorney's fees. These last mentioned items were waived by plaintiff on the trial, but plaintiff made proof that at the time the judgment was confessed there was due under the lease for accrued rent said aggregate sum of $382.

In Dr. Dunlap's affidavit of merits he admitted the execution of the lease and the occupancy of the demised premises by him and his co-tenant for a portion of the term. And he alleged that on some occasions, "to-wit, all of the months of November and December, 1929, and January, February, March and April, 1930," plaintiff failed to furnish sufficient heat to the premises; that "in January, 1930," after receiving notice of insufficient heat, plaintiff "not thereon the said sum as expressed stated herein" thereon plaintiff's preceding rent," against plaintiff's amount.

whereby on some occasions, "to-wit, during all the months of February, March and April, 1929," the heat in the offices was "unbearable"; and that because of his "constructive eviction" he finally vacated the premises "in July, 1929," and is not indebted to plaintiff in any sum.

To sustain his defense of constructive eviction, Dr. Hamilton testified on the trial, and he called several other witnesses, including his co-defendant, Dr. Payne. The testimony of these witnesses disclosed the following material facts in substance: On occasions during the months of December, 1928, and January, 1929, there was insufficient heat in the offices, and, upon complaints made, plaintiff endeavored to supply additional heat by putting in one of the offices another, and exposed, heating pipe. During the months of February and March, 1929, Dr. Hamilton made further complaints that at times there still was insufficient heat and at other times there was an excessive amount of heat. In the latter part of March he told plaintiff that because of these unsatisfactory conditions he was going to vacate the offices, but he did not do so and continued to pay rent for four months thereafter. During the months of April and May the offices were at times excessively hot and he made further complaints. He did not, however, vacate the offices until the end of the month of July when he moved into offices in another building. Apparently there was no trouble from either insufficient or excessive heat during the months of June and July. Dr. Payne continued to occupy the offices until the latter part of September, 1929, when he moved out. The rent for the month of August had been paid, as had also a part of the rent for the month of September. It further appeared that when in March, 1929, Dr. Hamilton told plaintiff that he was going to move, he had signed a lease for offices in another and new building (which was then not fully completed or ready for occupancy) for a term commencing May 1,

whereby he made occupied, "be-will, during all the months of February, March and April, 1917," the best in the offices was "unsatisfactory"; and that because of his "comparatively evicted" he finally vacated the premises "in July, 1919," and is not indebted to plaintiff in any sum.

In support of defence of constructive eviction, Mr. Hamilton testified on the trial, and he called several other witnesses, including his co-defendant, Mr. Hayes. The testimony of these witnesses disclosed the following material facts in substance: On September during the months of December, 1918, and January, 1919, there was insufficient heat in the offices, and, upon complaints made, plaintiff endeavored to supply additional heat by putting in one of the offices another, and exposed, heating pipe. During the months of February and March, 1919, Mr. Hamilton made further complaints that at times there still was insufficient heat and at other times there was an excessive amount of heat. In the latter part of March he told plaintiff that because of these unsatisfactory conditions he was going to vacate the offices, but he did not do so and continued in the premises for two months thereafter. During the months of April and May the offices were at times excessively hot and he made further complaints. He did not, however, vacate the offices until the end of the month of July when he moved into offices in another building. Apparently there was no trouble from either insufficient or excessive heat during the months of June and July, Mr. Hayes continued to occupy the offices until the latter part of September, 1919, when he moved out. The rent for the month of August had been paid, as had also a part of the rent for the month of September. It appears apparent that when in March, 1919, Mr. Hamilton told plaintiff that he was going to move, he had signed a lease for offices in another and new building (which was then not fully completed or ready for occupancy) for a term commencing May 1,

1929; that the completion of the new building was so delayed that he could not move into the new offices on May 1st; that on May 1st he knew that it could be several months before the new offices would be ready for him; and he continued to pay rent to plaintiff and to occupy the offices in plaintiff's building until the latter part of July, when he could conveniently move into said new offices. There was no evidence introduced showing that he could not have obtained offices in still another building for temporary occupancy for the intervening period between May 1st and August 1st.

After considering all of the evidence we are of the opinion that Dr. Hamilton's defense of constructive eviction was not sustained. It is well settled that there can be no constructive eviction without a vacating of the premises (Auto Supply Co. v. Scene-in-Action Corporation, 340 Ill. 196, 201; Keating v. Springer, 146 Ill. 481, 496); and that such vacating by the tenant must be within a reasonable time after the acts complained of. (Dennick v. Ekdahl, 102 Ill. App. 199, 201; Creutt v. Isham, 70 Ill. App. 102, 104.) What is such reasonable time is usually a question of fact for a jury, though under the circumstances of a particular case it may become a question of law. (Auto Supply Co. v. Scene-in-Action Corporation, 340 Ill. 196, 203; Kinn v. Hyde, 246 Ill. App. 26, 30.) In the last cited case it is said: "And while it is generally a question of fact whether the tenant vacated the premises within a reasonable time after breach by the landlord, yet such question may be a question of law where all reasonable minds reach the conclusion that the time was unreasonable." In the present case we think that from the evidence all reasonable minds would reach the conclusion that neither Dr. Hamilton nor his co-tenant, Dr. Payne, vacated the premises within a reasonable time after the claimed breaches by plaintiff, as landlord, in failing to furnish sufficient heat or in furnishing an excessive quantity of heat. And, hence, we think the trial court did not err in directing the verdict against defendants or in entering the judgment of May 5, 1930, appealed from.

Accordingly, the judgment is affirmed. AFFIRMED.

McAnlan, P.J., and Karner, J., concur.

1950); that the completion of the new building was so delayed that he could not move into the new offices on May 1st; that on May 1st he knew that it would be several months before the new offices would be ready for use; and he contended in fact that defendants were to occupy the offices in plaintiff's building until the latter part of July, when he could conveniently move into said new offices. There was no evidence introduced showing that he could not have obtained offices in still another building for temporary occupancy for the intervening period between May 1st and August 1st.

After considering all of the evidence in the case in the opinion that Mr. Smallwood's defense of constructive evictions was sustained. It is well settled that there can be no constructive eviction without a vacating of the premises (Dent Realty Co. v. Jones-Lipman Corporation, 1st Ill. 186, 201; Bright v. Ferguson, 1st 222, 221, 224); and that such vacating by the tenant must be within a reasonable time after the act complained of. (Kunzig v. Imrich, 1st 411, app. 199, 211; Cowin v. Cohen, 1st 111, app. 104, 1st.) That is more reasonable time in sustain a question of fact for a jury, though under the circumstances of a particular case it may become a question of law. (Lake Realty Co. v. Jones-Lipman Corporation, 246 Ill. 186, 200; Kunz v. Ziegler, 1st 111, app. 84, 1st.) In the last case cited it is said: "And while it is generally a question of fact whether the tenant vacated the premises within a reasonable time after breach by the landlord, yet such question may be a question of law where all reasonable minds reach the conclusion that the time was unreasonable." In the present case we think that from the evidence all reasonable minds would reach the conclusion that neither Mr. Smallwood nor his co-tenant, Mr. Myers, vacated the premises within a reasonable time after the claimed breaches by plaintiff, as landlord, in failing to furnish sufficient heat or in furnishing an adequate quantity of heat. Mr. Myers, as claim the total owers did not use in attorney the verdict against defendants or in reversing the judgment of May 3, 1950, appealed from. Accordingly, the judgment is affirmed.

AFFIRMED.

Tolle, and Kerner, j.j., concur.

34158

JOSEPH A. LAIBL,
Appellee,

v.

JEROME P. ZELENKA,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

261 I.A. 640

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

A judgment by confession for $1384.17 was entered on June 13, 1928, in favor of the plaintiff upon defendant's note, and on his petition said judgment was opened and he permitted to plead. On a hearing before the court without a jury May 31, 1929, the issues were found in favor of the plaintiff and it was ordered that the judgment stand in full force and effect. This appeal followed.

When the order of May 31, 1929, was entered defendant moved to vacate it and the motion was entered and continued. On December 2, 1929, the motion to vacate the order of May 31, 1928, was overruled and the defendant prayed an appeal, which was allowed on filing a bond in ten days and a bill of exceptions in thirty days. December 12, 1929, the time to file the bill of exceptions was extended to and including January 4, 1930. January 3, 1930, the time to file the bill of exceptions was extended ten days, and on January 13, 1930, the time to file the bill of exceptions was again extended to and including January 20, 1930. February 1, 1930, it was ordered that the time to file the bill of exceptions be extended to and including February 20, 1930, nunc pro tunc as of January 20, 1930. February 5, 1930, a bill of exceptions was signed,

sealed and filed with the clerk of the Superior court.

The time for presenting and filing a bill of exceptions can be extended only when the order is made before the right to the bill has expired. (Taylorville Sanitary District v. Nelson, 334 Ill. 510, 513.) According to these orders the time for filing a bill of exceptions expired on January 20, 1930. The bill of exceptions shown in the record was not signed or filed until February 5, 1930. The plaintiff has moved to strike the bill of exceptions appearing in the record on the ground that it was not signed, approved and filed within the time allowed by order of court for such filing.

In the case of Tierney v. Saumby, 237 Ill. App. 457, the court, quoting from McKay v. People, 145 Ill. App. 277, said:

"The law does not permit the entering of orders in a cause or the signing of bills of exceptions after jurisdiction has been lost by lapse of time. It is true that after a term at which a cause has been disposed of has expired amendments of the record may be made by nunc pro tunc orders so as to make the record speak the truth. But in such cases the amendment must be based upon some official or quasi-official note or memorandum or memorial paper remaining in the files of the case or upon the records of the court, the judge's minutes or some entry in some book required to be kept by law. A private memorandum of a witness is not sufficient; nor can the fact proposed to be incorporated into the record be based upon the recollection of the judge or other person, or upon affidavits or testimony taken after the event has transpired. And the basis upon which the amendment was made must be shown and preserved in the order or in the record. Hubbard v. People, 197 Ill. 15; Frew v. Danforth, 126 Ill. 242. The reason for the requirement that the basis of the amendment be shown and preserved is that the warrant for the exercise of the new jurisdiction may appear. The power of the court to exercise jurisdiction over the parties and the subject-matter expires with the termination of the term. Jurisdiction to exert power thereafter depends upon the existence of facts extrinsic to the record. Without such facts being shown in the record, upon review the record will show no jurisdiction." See also Hubbard v. People, 197 Ill. 15; People v. Rosenwald, 266 Ill. 548; People v. Leinecke, 290 Ill. 560; People v. C. B. & Q. R. R. Co., 316 Ill. 482.

The so-called nunc pro tunc order of February 1, 1930, failed to meet any of the requirements prescribed by the above referred to authorities. The purported bill of exceptions in this record cannot be considered, for it is no part of the record.

We are not asked to reverse because of any error apparent in

sealed and filed with the clerk of the superior court.

The time for presenting and filing a bill of exceptions can be extended only when the error is made before the right to the bill has expired. Fortarville Lumber District v. Nelson, 204 Ill. 434, 436.) According to these events the time for filing a bill of exceptions expired on January 30, 1930. The bill of exceptions shown in the record was not signed or filed until February 3, 1930. The plaintiff has moved to strike the bill of exceptions appearing in the record on the ground that it was not signed, approved and filed within the time allowed by order of court for such filing.

In the case of Tiernan v. Tiernan, 247 Ill. 494, 497, the court, quoting from Butler v. Trowbridge, 140 Ill. 475, 477, said:

"The law has not permit the omitting of evidence in a manner or the filing of bills of exceptions after jurisdiction has been lost by lapse of time. It is true that after a term in which a cause has been disposed of has expired amendments of the record may be made by nunc pro tunc orders so as to make the record speak the truth. But in such cases the amendment must be based upon some entries or judicial acts or memoranda of material matter transpiring in the trial of the case or upon the record of the court, the judge's minutes or some other evidence of the court. A private memorandum of a witness is not sufficient; nor can the fact proposed to be incorporated into the record be based upon the recollection of the judge or other persons, or upon affidavits or testimony taken after the event has transpired. And the basis upon which the amendment was made must be shown and preserved in the record or be the record."

Tiernan v. Tiernan, 247 Ill. 494; Butler v. Bowlerton, 140 Ill. 475. In the recent case of Wisnewski v. The Chicago Rapid Transit Company, 334 Ill. 434, 436, the court said: "The power of the court to exercise jurisdiction over the parties and the subject-matter expires with the termination of the term. Jurisdiction to enter nunc pro tunc orders upon the minutes of judgments of record to the record, without the power to make the record will speak the truth, upon review the record will show no jurisdiction." See also Hubbard v. People, 147 Ill. 123; People v. Commerford, 164 Ill. 224; People v. Kalkman, 190 Ill. 290; People v. [illegible], 214 Ill. 492.

The so-called nunc pro tunc order of February 1, 1930, failed to meet any of the requirements prescribed by the above referred to authorities. The purported bill of exceptions in this record cannot be considered, for it is no part of the record.

[illegible]

the common law record. There is, consequently, nothing before the court for consideration. The judgment of the Superior court is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

34492

PETER J. MANUSOS,
Defendant in Error,

v.

MARTIN GROSBY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

261 I.A. 610

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This suit is based upon a claim for a broker's real estate commission. There was a jury trial. After denial of defendant's motion for an instructed verdict in his behalf made at the close of plaintiff's evidence and again at the close of all the evidence, and denial of the usual motions for a new trial and in arrest of judgment, judgment was entered on a verdict in plaintiff's favor of $4,125.

Several errors are assigned. We shall consider only that of the denial of the motion for an instructed verdict.

The question presented for decision is whether or not the plaintiff was the efficient and procuring cause of the sale in question.

The real estate was owned by defendant on which a large garage was in process of construction. He sold and conveyed the same October 12, 1925, to one Fred Lewis, for the price of $137,500. The property had been placed by defendant in the hands of his brokers Plotke & Grosby, composed of Milton S. Plotke and Jacob Grosby. The defendant was not a member of the firm. Lewis had been intending to lease a garage but not to buy one, and while looking for one to lease he came in contact with one Prohov, who was promised a commission by Plotke if he procured a purchaser for

34102

Peter J. Blumenfeld,

defendant in error,

v.

Eugene Bennett,

plaintiff in error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This suit is based upon a claim for a broker's real estate commission. There was a jury trial. After denial of defendant's motion for an instructed verdict in his behalf made at the close of plaintiff's evidence and again at the close of all the evidence, and denial of the usual motions for a new trial and in arrest of judgment, judgment was entered on a verdict in plaintiff's favor of $4,150.

Several errors are assigned. We shall consider only that of the denial of the motion for an instructed verdict.

The question presented for decision is whether or not the plaintiff was the efficient and procuring cause of the sale in question.

The real estate was owned by defendant on which a large garage was in process of construction. He sold and conveyed the same October 13, 1922, to one Fred Lewis, for the price of $137,500. The property had been placed by defendant in the hands of his brother Jacob & Grosby, composed of William S. Jacobs and Jacob Grosby. The defendant was not a member of the firm. Lewis had been intending to lease a garage but not to buy one, and while looking for one to lease he came in contact with one Grosby, who was promised a commission by Jacobs if he procured a purchaser for

the property and afterwards took defendant to the office of Flotke & Grosby where he entered into a contract for the purchase of the same, which was afterwards consummated by a deed to him from the owner, who paid a commission of $2,500 to Prohov for his services as such broker. Neither Lewis nor Prohov had ever dealt with plaintiff or authorized any dealings with him. Defendant had authorized his brokers to offer a commission to any broker who would be the procuring cause of making a sale of the property upon terms satisfactory to him, but not specifically to plaintiff whom he did not know and with whom he had had no dealings. Nor were any negotiations had with plaintiff by defendant's brokers for the sale of the property to Lewis. They had given him the property to list, but they testified that he had never brought to them any knowledge of Lewis. His stenographer, however, testified that she mailed to them a letter dated September 22, 1925, stating Manusos had shown the garage to Mr. H. E. Rutishauser and Mr. Fred "Louis".

After plaintiff got permission to list the property he advertised that he had a garage of 40 to 300 car capacity for sale, not specifying any particular property. In response thereto one Howard E. Rutishauser, Jr., called on him and said his father and Mr. Fred Lewis sent him, and he wanted to take them to see the garage. Thereupon, after some conversation, plaintiff's stenographer filled out one of his printed cards, giving the location of the garage and stating it was offered for sale by plaintiff, and that "this will introduce Mr. H. E. Rutishauser and Mr. Fred Louis to Mr. Grosby, Address Ravenswood and Lawrence Avenue." Underneath was a printed form reading: "I agree if the above place is purchased by $\frac{me}{us}$ the deal will be closed by the office of P. J. Manusos. If not, $\frac{we}{I}$ will be liable for the commission." Signature of prospect. This was signed by young Rutishauser and handed to him,

the property and afterwards took defendant to the office of Plotin & Grasby where he entered into a contract for the purchase of the same, which was afterwards consummated by a deed to him from the owner, who paid a commission of $2,500 to Prohov for his services as such broker. Neither Lewis nor Prohov had ever dealt with plaintiff or authorized any dealings with him. Defendant had authorized his brokers to offer a commission to any broker who would be the procuring cause of making a sale of the property upon terms satisfactory to him, but not specifically to plaintiff whom he did not know and with whom he had had no dealings. Nor were any negotiations had with plaintiff by defendant's brokers for the sale of the property to Lewis. They had given him the property to list, but they testified that he had never brought in then any purchaser of Lewis. His stenographer, however, testified that she mailed in them a letter dated September 21, 1922, stating Summers had shown the property to Mr. H. T. Hutchinson and Mr. Fred "Louis".

Under plaintiff's permission to list the property he testified that he had a price of 40 to 300 per capacity for sale, not specifying any particular property. In response thereto one Howard E. Hutchinson, Jr., called on him and said his father and Mr. Fred Lewis sent him, and he wanted to take them to see the property. Thereupon, after some conversation, plaintiff's stenographer filled out one of his printed cards, giving the location of the property and stating it was offered for sale by plaintiff, and that "this will introduce Mr. H. T. Hutchinson and Mr. Fred Lewis to Mr. Grasby, Oliver Davenport and Lawrence Owens." Underneath was a printed form reading: "I agree if the above place is purchased by the undersigned will be closed by the office of J. L. Summers, if not, $\frac{1}{2}$% will be liable for the commission." Signature of prospect. This was signed by young Hutchinson and handed to him,

plaintiff receiving a carbon copy thereof which was received in evidence.

It does not appear that Rutishauser ever used the card of introduction. It appears that Rutishauser and Lewis had been acquainted for some fifteen years and that Rutishauser was interested only, as testified to by Lewis, in getting a job in case Lewis leased the garage.

The document in question had no tendency to establish a contractual relation with defendant nor to show that plaintiff was the procuring cause of the sale. At most, it could only show that plaintiff brought the attention of young Rutishauser, and through him that of the purchaser to the property. But there his connection with the sale ended. Upon that evidence and the further evidence that young Rutishauser accompanied Lewis when he was shown the property by one Prohov, another broker, rests plaintiff's entire claim of being the procuring cause of the sale.

The only interest young Rutishauser had was to procure a job in case his friend Lewis leased the garage. It was this that prompted him to get a list of places where a garage might be obtained. It was entirely voluntary on his part and not authorized by Lewis. The latter did not know and never had any dealings with plaintiff. While Lewis was looking for a place he came in contact with Prohov who also had the property for sale. It was he who specifically brought Lewis' attention to the property and interested him in the purchase. He took him to examine the same and afterwards to defendant's brokers to close the deal therefor.

It thus appears that plaintiff's sole claim for being the procuring cause of the sale rests upon his interview, as aforesaid, with young Rutishauser who represented no one but himself and who manifestly had nothing to do with bringing about negotiations for the sale. It was not until Lewis met Prohov that his attention

plaintiff receiving a million dollar interest which was received by erickson.

It does not appear that Wainwright ever read the deed of instructions. It appears that Fuhlhamer and Lewis had been acquainted for some fifteen years and that Fuhlhamer was interested only, as described to by Lewis, in getting a job in case Lewis loosed the garage.

The document in question had no tendency to establish a contractual relation with defendant nor to show that plaintiff was the proximate cause of the sale. At most, it could only show that plaintiff brought the existence of young Fuhlhamer, and thereby the fact of the purchaser to the property. But there was connection with the sale ended. Upon that evidence and the further evidence that young Fuhlhamer accompanied Lewis when he was shown the property by one Proctor, another broker, today plaintiff's sole claim of being the proximate cause of the sale.

The only interest young Fuhlhamer had was to procure a job in case his friend Lewis loosed the garage. It was this that prompted him to get a list of places where a garage might be wanted. It was entirely voluntary on his part and not suggested by Lewis. The latter did not know and never had any dealings with plaintiff. While Lewis was looking for a place he came in contact with Proctor who also had the property for sale. It was he who specifically sent Lewis' attention to the property and interested him in the purchase. He took him to examine the same and afterwards to defendant's brokers to close the deal therefor.

It thus appears that plaintiff's sole claim for being the proximate cause of the sale rests upon his interview, as afore-said, with young Fuhlhamer who represented no one but himself and who manifestly had nothing to do with bringing about negotiations for the sale. It was not until Lewis met Proctor that his attention

was directly called to the property or that any attempt was made to negotiate the sale through him. Plaintiff was still seeking a purchaser after the sale had been negotiated without any effort on his part to reach Nutishauser or any one with whom he was connected excepting that plaintiff testified that "I called Nutishauser a couple of times and nobody answered the phone and I tried to trace him back." In order to sustain a recovery by a broker of real estate commissions it must appear that such broker was the procuring cause of the sale effected. (Bowers v. Simpson, 160 Ill. App. 48.) It is well settled law that the broker who has been the efficient cause of the sale is the one entitled to commissions and that this right is not affected by the fact that he sells to one whose attention to the property had before been called by another broker. As said in McGuire v. Carlson, 61 Ill. App. 295, 300, and often repeated in other decisions: "It is not the broker who first speaks of the property, but he who is the procuring cause of the sale, be he the first or second who engaged the attention of the purchaser." It was also said in that case: "The defendant appears to have acted in good faith, and there is no reason why he should be subject to the payment of double commissions." The law on the subject has also been stated in Baldino v. Hennsberry, 191 Ill. App. 368:

> "Where several brokers are employed to procure a purchaser for real estate and one of them brings an action for commissions, he not only must prove that he commenced negotiations with a party who subsequently purchased the property, but, in order to recover, must also show by a preponderance of the evidence that he actually brought about the consummation of the sale, or was prevented from so doing by the fraud, procurement or misconduct or fault of the owner. * * * Where an owner of real estate employs several real estate brokers to effect a sale of his property, the broker whose efforts actually bring about the sale is the one who is entitled to the commissions for a sale, provided, the owner acts in good faith."

The broker must find and produce to the vendor a purchaser who is ready, willing and able to complete the purchase proposed before he is entitled to a commission. (Wilson v. Mason, 155 Ill. 304, 309.)

was directly called to the property or that any attempt was made to negotiate the sale through him. Plaintiff was still seeking a purchaser after the sale had been negotiated without any effort on his part to reach Dwightwater or any one with whom he was acquainted, stating that plaintiff testified that it called Dwightwater a couple of times and nobody answered the phone and I tried to trace him back." In order to sustain a recovery by a broker of real estate commissions it must appear that such broker was the procuring cause of the sale effected. (Bennett v. Chapman, 167 Ill. App. 69.) It is well settled law that the broker who has been the efficient cause of the sale is the one entitled to commissions and that this right is not affected by the fact that he sells to one whose attention to the property had before been called by another broker, as said in Kingsley v. Durham, 61 Ill. App. 598, 599, and often repeated in other decisions. "It is not the broker who first speaks of the property, but he who is the procuring cause of the sale, be he the first or second who engaged the attention of the purchaser." It was also said in that case: "The defendants appear to have acted in good faith, and there is no reason why he should be subject to the payment of double commissions." The law on the subject has also been stated in Bidlingmaier v. Kempshorn, 193 Ill. App. 580:

"Where several brokers are employed to procure a purchaser for real estate and one of them brings an option for consideration, he has only made prima facie the commission negotiations with a party who subsequently purchased the property, but, in order to recover, must also show by a preponderance of the evidence that he actually brought about the consummation of the sale, or was instrumental from on going by the front, practically or minimized as proximate cause of the sale. * * * Where an owner of real estate employs several real estate brokers to effect a sale of his property, the broker whose efforts actually bring about the sale is the one who is entitled to the commissions for a sale, provided, the owner acts in good faith."

The broker must find and produce to the vendor a purchaser who is ready, willing and able to complete the purchase proposed before he is entitled to a commission. (Pillsbury v. Brown, 112 Ill. App. 304, 308.)

It cannot be said on this state of facts that the evidence presented had any legitimate tendency to show that plaintiff was the efficient procuring cause of the sale. Even if Lewis' attention had been brought to the property by looking at a list of available properties furnished by Butishauser on which was the property in question, yet as the evidence discloses that Lewis gave the matter no special attention until induced to visit the property by Prohov, such fact had no tendency to establish plaintiff's right to a commission.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

It remains to deal on this state of facts that the evidence presented has not legitimate tendency to show that plaintiff was the efficient procuring cause of the sale. Even if Lewis' attention had been brought to the property by looking at a list of available properties furnished by defendant on which was the property in question, yet as the evidence discloses that Lewis gave the matter no special attention until induced to visit the property by Tyndall, such fact had no tendency to establish plaintiff's right to a commission.

The judgment is reversed and the cause remanded.

BRAMBLETT AND KNOWLES.

Hopkins, J., dis. and Britain, J., concur.

513
34503

JOHN R. GEARY,
Appellant,

v.

M. L. KOENIG and
N. W. KOENIG,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

261 I.A. 640

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

A judgment by confession for $275 due for rent and $20 attorneys' fees authorized in the lease of certain premises from plaintiff to defendants was entered and on defendants' petition vacated and set aside. On a hearing before the court plaintiff's damages were assessed at $155.60, to which was added as part of the costs $25 for attorneys' fees. This appeal followed.

At the hearing defendants claimed three grounds of defense; (1) lack of supply of water for maintenance and continuation of defendants' business due to frozen pipes; (2) lack of adequate radiators to enable defendants to supply sufficient hot water to keep the water in flowing condition, and (3) that the windows and doors permitted the air to come in.

It appears from the lease in question that at the time of its execution the lessees examined and knew the condition of the premises and received them in good order and repair, that no representations not therein expressed or indorsed thereon - and there was none - had been made by the lessor as to the condition or repair of the premises, and that the lessees would keep the same in good repair at their own expense. There was no provision in the lease for repairs by the lessor unless the premises were rendered untenantable by fire, and then repair by the lessor was merely optional.

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT.

A judgment by confession for $271 due for rent and $50 attorney's fees authorized in the lease of certain premises from plaintiff to defendants was entered and on defendants' petition vacated and set aside. On a hearing before the court plaintiff's damages were assessed at $158.60, to which was added as part of the costs $25 for attorney's fees. This appeal followed.

At the hearing defendants claimed three grounds of defense: (1) lack of supply of water for maintenance and consumption of defendants' business due to frozen pipes; (2) lack of the rent relieves to enable defendants to supply sufficient hot water to keep the water in flowing condition, and (3) that the windows and doors permitted the air to come in.

It appears from the lease in question that at the time of its execution the lessees examined and knew the condition of the premises and received them in good order and repair, that no representations not therein expressed or indorsed thereon - and there was none - had been made by the lessor as to the condition or repair of the premises, and that the lessees would keep them most in good repair at their own expense. There was no provision in the lease for repairs by the lessor unless the premises were rendered untenantable by fire, and then repair by the lessor was merely optional.

The lease was under seal and never modified. It was dated April 17, 1928. Defendants took possession under it and operated their business of repairing automobile brakes for over twenty months. January 21, 1930, without giving plaintiff any notice and without paying the rent of $275 that was payable on the first of the month, defendants vacated the premises. Notwithstanding the plain provisions of the lease, the court, contrary to familiar law, heard testimony of preliminary verbal promises which, if made, unquestionably merged into the lease, and also of subsequent promises to fix the windows and to put in an additional radiator which, if made, were a nudum pactum. The court ruled that, "there is an implied duty on the part of the landlord to furnish apparatus sufficient to heat the premises in that line of business to a certain degree of temperature." The law on the subject is so well settled that it is supererogatory for an appellate court to have to refer to it. It seems, therefore, unnecessary to repeat that where the parties have made an express agreement the law does not enlarge or qualify it by implication; (Rubens v. Hill, 213 Ill. 523; Taylor on Landlord and Tenant, 8th Ed. Sec. 253); that there is no implied covenant on the part of the landlord that leased premises are fit for the purposes for which they may be rented or that they are in any particular condition; (Sunasack v. Morey, 196 Ill. 569, 571; Cromwell v. Allen, 161 Ill. App. 404, 406; Patson v. Moulton, 13[illegible] id. 560); or tenantable or will continue so during the term, and that a landlord is not bound to repair unless he has expressly agreed to do so, and that a promise to repair after the lease is entered into is a mere nudum pactum. (Woods on Landlord and Tenant, sec. 382; Humiston, Keeling & Co. v. Wheeler, 175 Ill. 514, 519.)

The written lease being before the court in the statement of claim showing express covenants that exclude any duty on the

The lease was paper deed and never modified. It was dated April 17, 1928. Defendants took possession under it and operated their business of repairing automobile bodies for over twenty months. January 31, 1930, without giving plaintiff any notice and without paying the rent of $125 that was payable on the first of the month, defendants vacated the premises. Notwithstanding the plain provisions of the lease, the court, contrary to Justice Lee, based violation of preliminary verbal promises which, if made, unquestionably merged into the lease, and also of subsequent promises to fix the windows and to put in an additional radiator which, if made, were a [illegible]. The court ruled that, "there is an implied duty on the part of the landlord to furnish apparatus sufficient to heat the premises in that line of business to a certain degree of temperature." The law on the subject is so well settled that it is supererogatory for an appellate court to have to refer to it. It seems, therefore, unnecessary to repeat that where the parties have made an express agreement the law does not enlarge or limit it by implication. (Adams v. Hill, 223 III. 431; Taylor on Landlord and Tenant, 8th Ed. Sec. 123); that there is no implied covenant on the part of the landlord that leased premises are fit for the purposes for which they may be rented or that they are in any particular condition. (Dunnock v. Berry, 198 Ill. App. 371, Kennedy v. Allen, 141 Ill. App. 624, Dixon v. Munizen, 130 id. 560); or tenantable or will continue so during the term, and that a landlord is not bound to repair unless he has expressly agreed to do so, and that a promise to repair after the lease is entered into is a mere [illegible]. (Woods on Landlord and Tenant, sec. 182; Humphrey, Keeling & Co. v. Meister, 192 Ill. 214, 217.)

The written lease being before the court in the statement of claim showing express covenants that exclude any duty on the

part of the landlord to make repairs and negativing the right to any such grounds of defense as are here made, there was no justification in law for opening up or setting aside the original judgment or in entering the judgment appealed from.

As the only disputed facts are thus presented by evidence which, under the principles stated, were inadmissible and should have been disregarded, we must, in the face of this record, reverse the judgment appealed from and enter a judgment in this court for $295 in favor of the plaintiff and against the defendants.

JUDGMENT REVERSED WITH FINDING OF FACT
AND JUDGMENT ENTERED HERE.

Hanlan, P. J., and Gridley, J., concur.

34503

FINDING OF FACT.

We find as a fact in this case that defendants M. L. Koenig and M. W. Koenig were indebted to the plaintiff, John R. Geary, on January 24, 1930, in the sum of $275 for rent of the premises known as 7430-32 Stony Island avenue, Chicago, Illinois, for the month of January, 1930; also for the sum of $20 for attorneys' fees in entering up judgment.

34564

WILLIAM H. BURN,
Appellee,

v.

LEE STURGES,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

261 I.A. 641

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit to recover money claimed to be due plaintiff, William H. Burn, from defendant, Lee Sturges, for services in bringing about the consolidation of Sturges & Burn Mfg. Co., a corporation, with the Solar Metal Products Co. The declaration contained only the common counts. The plea was non assumpsit. The cause was tried before the court and jury and resulted in a verdict and judgment against the defendant for $62,500. Defendant appealed.

There was no express agreement as to the amount of compensation to be paid plaintiff. The agreement upon which the plaintiff relied to establish his claim against the defendant was in the form of a conversation which the plaintiff claims he had with defendant, in which defendant agreed that if the consolidation went through he would pay the plaintiff an amount, the interest of which would be sufficient to take care of his family in the event of anything happening. The defendant denied that he ever had any such conversation.

The defendant contends that the plaintiff failed to prove the reasonable worth of his services or to establish his damages by any proper evidence; that the verdict is against the manifest weight of the evidence and that there was no undertaking by the defendant

[illegible]

[illegible] v. [illegible],

[illegible],

v.

[illegible] Appellee.

[illegible] from circuit court.

[illegible] COURT.

[illegible]

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit to recover money claimed to be due plaintiff, William H. Dunn, from defendant, Lee Sturges, for services in drawing about the consolidation of Sturges & Dunn Mfg. Co., a corporation, with the Lake Metal Products Co. The declaration contained only the common counts. The plea was non assumpsit. The cause was tried before the court and jury and resulted in a verdict and judgment against the defendant for $[illegible], defendant appeals.

There was no express agreement as to the amount of compensation to be paid plaintiff. The agreement upon which the plaintiff relied to establish his claim against the defendant was in the form of a conversation which the plaintiff claimed he had with defendant, in which defendant agreed that if the consolidation went through he would pay the plaintiff an amount, the interest of which would be sufficient to take care of his family in the event of anything happening. The defendant denied that he ever had any such conversation.

The defendant contended that the plaintiff failed to prove the reasonable worth of his services or to establish his damages by any proper evidence; that the verdict is against the manifest weight of the evidence and that there was no understanding by the defendant

individually to pay plaintiff and that none will be implied. The entire and only evidence of plaintiff's damages is the testimony of Joseph Wingfield, Owen Moore and Edward C. Smeeth. Joseph Wingfield testified that he had something to do with the sale or consolidation of corporations in the past ten years such as bank corporations and various industrials; that he had experience where no price was fixed for the consolidation or sale of a business as to the usual charge for such services. He was asked the question, "what was the reasonable, usual and customary charge where an individual, at the request of an officer who was president of a corporation of $1,500,000 estimated value, starts negotiations to have that corporation consolidated with a corporation with a value of $800,000, and that such consolidation takes place and no price is fixed for the services of the individual who brings the parties together for the purpose of consolidation?" He replied, that if paid in cash it would be ten to fifteen per cent; that if not paid in cash the conditions would change the situation some; that it would be more if deferred payments were to be considered.

Owen Moore testified that he was a certified public accountant and had occasion to examine into conditions of consolidated corporations; that as such he had been brought in touch with amounts charged as "commissions" for the consolidation of corporations; that he had examined several every year; that he knew the reasonable, usual and customary charge for bringing about the consolidation of corporations, and in response to the question, "what is the usual, customary and reasonable charge where a man is employed to bring about the meeting between two parties which results in the consolidation of two corporations in which the amount of $1,500,000 is the amount at which the person who employs him valued his corporation," replied: Ten per cent payable in cash is a fair fee. The witness Edward C. Smeeth testified that he was president of an investment securities company and

Individually in my plaintiff and that mere will be implied. The entire and only evidence of plaintiff's damages is the testimony of Joseph Inglehart, Evan Roser and Edward C. Smith. Joseph Inglehart testified that he had something to do with the sale or consolidation of corporations in the past ten years such as bank corporations and various industrials; that he had experience where no price was fixed for the consolidation or sale of a business as to the usual charge for such services. He was asked the question, "What was the reasonable, usual and customary charge where an individual, at the request of an officer who was president of a corporation of $1,000,000 outstanding value, starts negotiations to have that corporation consolidated with a corporation with a value of $500,000, and that such consolidation takes place and no price is fixed for the services of the individual who brings the parties together for the purpose of consolidation?" He replied, that if paid in cash it would be ten to fifteen per cent; that if not paid in cash the conditions would change the situation some; that it would be more if deferred payments were to be considered.

Evan Roser testified that he was a certified public accountant and had occasion to examine into conditions of consolidated corporations; that he had been engaged in issues with accounts charged as "goodwill" for the consolidation of corporations; that he had examined several very; that he knew the reasonable, usual and customary charge for bringing about the consolidation of corporations, and in response to the question, "What is the usual, customary and reasonable charge where a man is employed to bring about the meeting between the parties which results in the consolidation of two corporations in which the amount of $1,000,000 is the amount at which the person who employs his values his corporation," replied: Ten per cent payable in cash is a fair fee. The witness Edward C. Smith testified that he was president of an investment securities company and

as such had something to do with getting parties together to consolidate businesses or corporations during the past ten years; that he was familiar with the usual, reasonable and customary charge for bringing parties together who consolidated organizations; that the maximum was a prescribed, usual or professional fee, and in response to the question, "what was the reasonable and customary charge where a person brings parties together and continues for a time to examine the plant and then the deal is consummated later between the principals and the lawyers, based upon the valuation of the person who employs him," replied: The minimum would be ten per cent, from that up. Objections were made to each of the questions on the ground that the question did not contain sufficient facts; that the question was not in proper form, and that the witness was not properly qualified, and that the question, being a hypothetical question, did not contain facts, and that it did not appear that the witnesses had heard the testimony. The objections were overruled.

Neither of the parties to this cause was a broker or in any way engaged in the business of consolidating corporations. There was no evidence of a general usage or custom. In the hypothetical questions the facts, as shown by the testimony in the case, were not stated, neither was the relation of the parties, the time or efforts spent by the plaintiff, the manner or means by which the consolidation was effected. Nor did it appear that the witnesses knew the circumstances under which the services were rendered, what they were, where and when performed; nor did they have personal knowledge of all the services rendered; nor were they asked what was the customary charge for particular services rendered, detailed and specified in their hearing in the evidence or in the hypothetical questions put to them. They were asked only to state the usual, reasonable and customary charge for bringing about the consolidation of corporations. They testified to the usual and customary commissions paid for introducing parties in a consolidation

as such had something to do with getting parties together to consolidate businesses or corporations during the past ten years; that he had dealt with the usual, reasonable and customary charge for his services; the witness was immaterial; organizations; that the machine was a [illegible], minor or professional fee, but in response to the question, "Was the reasonable and customary charge where a person brings parties together and continues for a time to examine the plant and also the soil to ascertain later whether the principals and the Inventor, based upon the valuation of the person who employs him," replied: "He without cause or his part, from that up.

Objections were made to each of the questions on the ground that the question did not contain material facts; that the question was not in proper form, and that the witness was not properly qualified, and that the question, being a hypothetical question, did not contain facts, and that it did not appear that the witnesses had heard the testimony. The objections were overruled.

Neither of the parties to this cause was a broker or in any way engaged in the business of consolidating corporations. There was no evidence of a general usage or custom. In the hypothetical questions the facts, as shown by the testimony in the case, were not stated, neither was the relation of the parties, the time or efforts spent by the plaintiff, the manner or means by which the consolidation was effected. Nor did it appear to the witnesses that circumstances under which the services were rendered, when they were, where and what performed; nor did they have personal knowledge of all the activies rendered; nor were they aware what was the customary charge for similar services, [illegible] and expressed in their testimony in the evidence or in the hypothetical questions put to them. They were asked only to state the usual, reasonable and customary charge for arranging about the consolidation of corporations. They testified to the usual and customary consideration paid for introducing parties in a consolidation

in the nature of a broker's fee. The objection here is to the insufficiency of the evidence to sustain the verdict.

The only question necessary to be considered, presented by this record is - has the plaintiff proved the reasonable value of his services and established his damages by any proper evidence? The reasonable value of services can only be established by showing the usual, customary and reasonable value of the particular services rendered. It is the proof of a fact, like any other fact in the case, and unless particular services are described there is no evidence of reasonable value. From this record, it was the theory of the plaintiff, that he was entitled to a commission established by a customary charge, regardless of the actual services rendered and that it was unnecessary for him to particularize the services rendered. No inquiry was made of the witnesses - what was the customary charge for particular services rendered, detailed and specified in their hearing in the evidence or in the hypothetical question. The defendant was not bound by any custom of the brokerage business, nor could he be presumed to have contracted with reference to any customary charge of commissions paid in that line of business. Persons not engaged in a business are not bound by customs or usages of the business. A usage or practice, to have the standing in law as a custom, must be uniform within some sphere; it must be long established and generally acquiesced in; to bind the defendant it must be shown that he had actual knowledge of the custom, or such facts must be shown from which he could be fairly chargeable with having knowledge, so that it entered into and became a part of plaintiff's contract. (Dyer v. Sutherland, 75 Ill. 583; Owern v. Churchill, 155 Ill. pp. 505; Kelly v. Carroll, 223 Ill. 309.)

A question propounded to an expert witness must recite in substance all the services testified to or he must have heard the testimony or have personal knowledge of all the services rendered.

in the nature of a broker's fee. The objection here is to the insufficiency of the evidence to sustain the verdict.

The only question necessary to be considered, prompted by this record is - has the plaintiff proved the reasonable value of his services and established his example by any proper evidence? The reasonable value of services can only be established by showing the usual, customary and reasonable value of the particular services rendered. It is the proof of a fact, like any other fact in the case, and unless particular services are described there is no evidence of reasonable value. From this record, it was the theory of the plaintiff, that he was entitled to a commission established by a customary charge, regardless of the actual services rendered and that it was unnecessary for him to particularize the services rendered. No inquiry was made of the witnesses - who was the customary charge for particular services rendered, detailed and specified in their having in the evidence or in the hypothetical question. The defendant was not bound by any custom of the brokerage business, nor could he be presumed to have contracted with reference to any customary charge of commissions paid in that line of business. Persons not engaged in a business are not bound by customs or usages of the business. A usage or practice, to have the standing in law of a custom, must be uniform within some sphere; it must be long established and generally acquiesced in; to bind the defendant it must be shown that he had actual knowledge of the custom, or such facts must be shown from which he could be fairly chargeable with having knowledge, so that it entered into and became a part of plaintiff's contract. (Lyon v. Culbertson, 83 Ill. 568; Jones v. Brunswick, 110 Ill. 39; Kelly v. Crawford, 85 Ill. 100.)

A question propounded to an expert witness must recite in substance all the services testified to or be must have heard the testimony or have personal knowledge of all the services rendered.

(Wolters v. Mason, 189 Ill. App. 560; Pyle v. Pyle, 158 Ill. 289.) A hypothetical question is only proper to be put to expert witnesses when the facts therein stated are fairly within the range of the testimony. (Fuchs v. Tong, 218 Ill. 445, 448), and such testimony is of no value when the hypothetical question does not cover the material facts in the case, such as the relations of the defendant, the circumstances under which the services were rendered, the time employed, the nature and extent of the consultations and all the circumstances surrounding the services. (McNamara v. McNamara, 84 N. E. 901; Brady v. Richey & Casey, 187 N. W. 508.) The objections made to the questions propounded to these witnesses should have been sustained. Since we have arrived at the conclusion that there must be a new trial, we refrain from passing upon the weight of the evidence. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

(Tolbert v. Gerber, 308 Ill. 465, 468; Ziegler v. Ziegler, 320 Ill. 489.) A hypothetical question is only proper to be put to expert witnesses when the facts therein stated are fairly within the range of the evidence. (Mann v. Jones, 218 Ill. 418, 423; and when hypothetical in nature when the hypothetical question does not cover the material facts in the case, such as the relations of the defendant, the circumstances under which the matters were transacted, the time employed, the manner and extent of the conversations and all the circumstances surrounding the matters. (Hickman v. Hickman, 84 N. E. 803; Ziegler v. Ziegler, 147 Ill. 117.) The objections made to the questions propounded to these witnesses should have been sustained. There is more written in the conclusion than there must be a new trial, so further from passing upon the weight of the evidence. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Justices, D. C., and Grigsby, J., concur.

34579

HARRY J. FIREMAN,
Appellee,

v.

OLIVER F. SMITH et al.,
Defendants.

Appeal of OLIVER F. SMITH,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

261 I.A. 641

MR. JUSTICE KRAMER DELIVERED THE OPINION OF THE COURT.

Harry J. Fireman, complainant, filed a creditor's bill on a judgment of the Municipal Court of Chicago against the defendant, Oliver F. Smith; the judgment was obtained by William Hughes February 27, 1925, for $32,403.60, upon a judgment note dated November 28, 1921, which judgment had been assigned by Hughes to the complainant June 2, 1927. Oliver F. Smith filed his cross bill to have said judgment set aside and to have it and the indebtedness declared paid, and to have the bailiff's deed issued upon said judgment surrendered and cancelled. The chancellor entered a decree as prayed for in the amended bill of complaint, finding that the Municipal Court judgment is in full force and effect and unsatisfied as to $19,008.57, plus interest and costs, and appointed a receiver of all the assets of Oliver F. Smith, and dismissed the cross bill of Oliver F. Smith for want of equity. To reverse this decree the defendant, Oliver F. Smith, appealed. Oliver F. Smith will be hereafter designated as the defendant.

The original bill alleged the recovery of the judgment February 27, 1925. Its assignment to complainant June 2, 1927, alleged the issue and return nulla bona of execution, and that

[illegible]

[illegible] v. [illegible],
Appellant,

v.

[illegible] v. [illegible] et al.,
Defendants.

Appeal of [illegible] v. [illegible],
Intervenor.

No. 10[illegible] [illegible] THE [illegible] OF THE [illegible].

Harry J. Tiernan, complainant, filed a creditor's bill on a judgment of his against Lucy W. Johnson against the estate of Oliver T. Smith. The judgment was obtained by filing Suffolk February 27, 1883, for $[illegible], upon a judgment note dated November 28, 1881, which judgment had been assigned by Hughes to the complainant June 2, 1887. Oliver T. Smith filed his cross bill to have said judgment set aside and to have it and the indebtedness declared paid, and to have the bill's deed issued upon said judgment surrendered and cancelled. The chancellor entered a decree as prayed for in the amended bill of complaint; finding that the Municipal Court judgment is in full force and effect and unsatisfied in the $[illegible], plus interest and costs, and appointed a receiver of all the assets of Oliver T. Smith, and dismissed the cross bill of Oliver T. Smith for want of equity. To reverse this decree the defendant, Oliver T. Smith, appeals. Oliver T. Smith will be hereafter referred to as the defendant.

The original bill alleged the recovery of the judgment February 27, 1883. The assignment to complainant June 2, 1887, alleged the issue and return unsatisfied of execution, and that

defendant had various assets and asked for discovery as to unknown assets. By amendment to the bill it charged that December 27, 1921, there was delivered to Harry E. Staver, president of Citizens Trust and Savings Bank, certificates for 301 shares of capital stock of said bank in the name of defendant and indorsed in blank by him; that said certificates are still in his name and in the possession of the bank and Staver and are still defendant's property, subject to the lien of plaintiff's judgment and prays that the bank and Staver may be ordered to issue and deliver said stock to the receiver. It also made the bank and Staver defendants. Defendant answered under oath, denying specifically every allegation of the bill except as to the recovery of the judgment, issue and return of the execution and the filing of the assignment, and alleged that at the time of the entry of the judgment the amount due on the note had been reduced by payments collected by Hughes to less than $10,000 and denied that anything remained due on said judgment above defendant's claim and set-off; that before the assignment, all money due on the note had been fully paid; that complainant was not the equitable owner of the judgment, that he was a secret agent of Hughes, and that complainant knew said facts; that on June 10, 1920, defendant purchased certain real estate referred to as the 91st street property from Marshall Smith, then the owner and in possession thereof, improved with a brick apartment building; that all the consideration therefor was furnished by defendant but the deed was executed by said Marshall Smith to said Hughes at defendant's request and said Hughes accepted said conveyance and agreed with defendant to manage said property as defendant's agent and to hold the title thereto subject to his order and upon his request to execute to him at any time a conveyance thereof and during all the time that such title was held by Hughes he would render an accounting and pay to

defendant had various counts and asked for discovery so to minimize assets. By amendment to the bill it charged that December 27, 1921, there was delivered to Harry X. Tanner, president of Citizens Trust and Savings Bank, certificates for 325 shares of capital stock of said bank in the name of defendant and indorsed in blank by him; that said certificates are still in his name and in the possession of the bank and therefore and are still defendant's property, subject to the lien of plaintiff's judgment and prays that the bank and officer may be ordered to issue and deliver said stock to the receiver. It also made the bank and officer defendants. Defendant answered under oath, denying specifically every allegation of the bill except as to the recovery of the judgment, issue and return of the execution and the filing of the assignment, and alleged that at the time of the entry of the judgment the amount due on the note had been reduced by payments collected by Hughes to less than $10,000 and denied that anything remained due on said judgment above defendant's claim and affirmatively that before the assignment, all money due on the note had been duly paid; that complainant was not the equitable owner of the judgment, that he was a mere agent of Hughes, and that complainant knew said facts; that on June 10, 1920, defendant purchased certain real estate subject to an the first chattel property from Marshall Smith, then the owner and in possession thereof, improved with a brick apartment building; that all the consideration therefor was furnished by defendant but the deed was executed by said Marshall Smith to said Hughes at defendant's request and said Hughes accepted said conveyance and agreed with defendant to manage a it property as defendant's agent and to hold the title thereto subject to his order and upon his request to execute to him at any time a conveyance thereof and during all the time that such title was held by Hughes he would render an accounting and pay to

the defendant all money received as rents, process of sale, mortgage or other transfers, which agreement was verbal, and on the same day Hughes and his wife executed and delivered to defendant a deed conveying this property to defendant which was held by him unrecorded until destroyed; that Hughes received and accounted to defendant for the rents from this property up to October 1, 1922, but thereafter ceased and refused to account; that Hughes is indebted to defendant in an unknown amount representing rents, proceeds and income received from said property from and after November 1, 1922, and still continues to collect said income; that defendant has repeatedly applied to Hughes for an accounting and conveyance of said property and has now pending in the Circuit Court of Cook County his bill against Hughes praying for such accounting; that said judgment was entered by confession upon a note signed by defendant for $30,000; that a pluries writ of execution was issued on said judgment June 26, 1927, and a levy thereof made on defendant's interest in said 91st street property and the same advertised to be sold July 13, 1927; that there are and were at the time of said alleged assignment and bailiff's sale due defendant from said Hughes large amounts of money as rents, profits and proceeds derived from said 91st street property and from the collateral security mentioned in defendant's answer to the original bill of complaint in excess of all money at any time due on said judgment and all money due or owing from defendant to Hughes; that defendant is entitled to said rents and proceeds and said Hughes had, at the time of said bailiff's sale, and has since, collected sufficient rents and proceeds from said 91st street property and collateral security to entirely pay any indebtedness ever due to Hughes upon said judgment; that said Hughes is holding the apparent record title to said 91st street property as trustee for defendant; that complainant has no interest in said judgment or bailiff's certificate of sale and should in equity retain no title or interest

certificates of sale and should in equity retain no title or interest; that complainant has no interest in said judgment or Bailiff's sale; complainant filed a bill against property to restrain enforcement of said judgment; that said Hughes is indebted to defendant in an unpaid amount representing rents, proceeds and income received from said property from and after December 1, 1941, and still continues to collect said income; that defendant has repeatedly applied to Hughes for an accounting and conveyance of said property and has now pending in the Circuit Court of Cook County his bill against Hughes praying for such accounting; that said judgment was entered by confession upon a note signed by defendant for $20,000; that a partial sale of execution was issued on said judgment June 24, 1937, and a levy thereof made on defendant's interest in said 51st street property and the same advertised to be sold July 13, 1937; that these are and were at the time of said alleged conveyances and Bailiff's sale the defendant from said Hughes large amounts of money as rents, profits and proceeds derived from said 51st street property and from the collateral security mentioned in defendant's answer to the original bill of complaint in excess of all money at any time due on said judgment and all money due or owing from defendant to Hughes; that interested in equities in said rents and proceeds and said Hughes had, at the time of said Bailiff's sale, and has since, collected multiple rents and proceeds from said 51st street property and collateral security to satisfy any indebtedness over due to Hughes upon said judgment; that said Hughes in holding the aforesaid legal title in said 51st street property is trustee for defendant; that complainant has no interest in said judgment or Bailiff's certificate of sale and should in equity retain no title or interest

under said sale; that said certificate of sale ought to be surrendered; that said 91st street property has always been worth $100,000; that said Hughes has also held as collateral security for defendant's notes and indebtedness a large amount of bonds and shares of stock, which bonds said Hughes has disposed of without accounting to defendant for the proceeds; that Hughes obtained said bonds and shares of stock on December 27, 1921, from the State Bank of Chicago; that said collateral security was held by Hughes and certain bonds with interest thereon were paid to and collected by him in full on May 1, 1927; that at or after the time said Hughes so acquired said notes and collateral security from said bank, defendant stated to Hughes that Hughes then held the record title to said 91st street property and to continue to hold it as security for payment of all defendant's indebtedness and that in order to make said Hughes more secure, defendant would tear up said deed of conveyance of said 91st street property so made by Hughes and wife to defendant and thereafter, on January 6, 1922, did so in the presence of Hughes; that said promissory notes, though long since fully paid, have never been surrendered but are still held by Hughes; that said pluries writ of execution, sale, certificate of sale and any bailiff's deed issued thereon are null and void and mere clouds on defendant's title to said real estate; admits said 301 shares of bank stock described in the amendment to the original bill were in defendant's name, indorsed in blank by him, appear in his name on the books of said bank and are still in the possession of said bank and said Staver, and are still defendant's property and were on December 27, 1921, delivered to said Staver as stated in said amendment, except that they were so delivered to said Staver as agent of William Hughes with his knowledge and consent to be held as collateral security for any indebtedness of defendant to said Hughes.

owner and other City and municipalities of said county to be approximately this said first street property has always been worth $100,000; that said Hughes has also held as collateral security for defendant's notes and indebtedness a large amount of bonds and shares of stock, which bonds said Hughes has disposed of without accounting as understood for the proceeds; that Hughes obtained said bonds and shares of stock on November 27, 1921, from the State Bank of Chicago; that said collateral security was held by Hughes and certain bonds with interest thereon were paid to and collected by him in full on May 1, 1927; that at after the time said Hughes so received said notes and collateral security from said bank, defendant stated to Hughes that Hughes then held the record title to said first street property and is continue to hold it as security for payment of all defendant's indebtedness and that in order to make said Hughes more secure, defendant would deed up said deed of conveyance of said first street property so made by Hughes and wife to defendant and therefor, on January 6, 1922, did so in the presence of Hughes; that said preliminary notes, though long since fully paid, have never been surrendered but are still held by Hughes; that said plaintiff with of exception, sale, certificate of sale and any bill-ill's deed issued thereon are null and void and were signed on defendant's title to said real estate; subject said 50% shares of bank stock described in the amendment to the original bill were in defendant's name, indorsed in blank by him, appear in his name on the books of said bank and are still in the possession of said bank and said Hughes, and are still defendant's property and were on December 27, 1921, delivered to said Hughes as stated in said amendment, except that they were so delivered to said Hughes as agent of William Hughes with his knowledge and consent to be held as collateral security for any indebtedness of defendant to said Hughes.

The defendant's cross bill contained the same allegations as his answer and prayed that said bailiff's certificate of sale and any bailiff's deed issued or to be issued thereon may be set aside and declared void as against defendant as a cloud upon his title and that complainant may be required to satisfy said judgment of record in the Municipal Court and have general relief.

October 29, 1928, complainant having moved for the appointment of a receiver, the court ordered that the motion "be held in abeyance pending a hearing on defendant's offer to prove that the judgment had been paid some time between February 27, 1925, and June 2, 1927, and that the cause be referred to a master to hear evidence and report on the sole question 'was said judgment paid by defendant to Hughes some time between February 27, 1925, and June 5, 1927?'" A hearing was had before the master, at which defendant and Hughes and other witnesses testified and documentary evidence was introduced. The master filed his report in which, after making numerous findings, he concluded that "said judgment has not been paid." On December 11, 1928, the chancellor approved the report of the master and entered an order appointing a receiver for the assets of the defendant. From the entry of this order defendant appealed. This division of the Appellate Court affirmed the order appealed from April 30, 1929. During the time the appeal from the interlocutory decree was pending and on January 9, 1929, the cause was referred to a master to take proofs and report the same with his conclusions of law and fact; a hearing was had before the master at which witnesses for the respective parties testified, and documentary evidence was introduced, and it was stipulated that the evidence that was taken on the former hearings shall be considered the same as if the parties called the witnesses at this hearing. The master filed his report, exceptions filed by the defendant were overruled and the court entered the decree appealed from, in which

The defendant's cross bill contained the same allegations as his answer and prayed that said bailiff's certificate of sale and any bailiff's deed issued or to be issued thereon may be set aside and declared void as against defendant as a cloud upon his title and that complainant may be required to satisfy said judgment of record in the Municipal Court and have general relief.

October 29, 1928, complainant having moved for the appointment of a receiver, the court ordered that the motion "be held in abeyance pending a hearing on defendant's offer to prove that the judgment had been paid some time between February 27, 1925, and June 2, 1927, and that the cause be referred to a master to hear evidence and report on the sole question 'was said judgment paid by defendant to Burke some time between February 27, 1925, and June 2, 1927?' A hearing was had before the master, at which defendant and Burke and other witnesses testified and documentary evidence was introduced. The master filed his report in which, after making numerous findings, he concluded that "said judgment has not been paid." On December 11, 1928, the chancellor approved the report of the master and entered an order appointing a receiver for the assets of the defendant. From the entry of this order defendant appealed. This division of the Appellate Court affirmed the order appealed from April 30, 1929.

During the time the appeal from the interlocutory decree pending and on January 9, 1929, the cause was referred to a master to take proofs and report the same with his conclusions of law and fact; a hearing was had before the master at which witnesses for the respective parties testified, and documentary evidence was introduced, and it was stipulated that the evidence that was taken on the former hearings shall be considered the same as if the parties called the witnesses at this hearing. The master filed his report, exceptions filed by the defendant were overruled and the court entered the decree appealed from, in which

the chancellor finds, among other things, that on February 27, 1927, a judgment was entered in the Municipal Court of Chicago in favor of William Hughes and against Oliver F. Smith, in the sum of $32,403.60, which judgment was based on a certain judgment note for $30,000 executed by said Oliver F. Smith. That an execution thereupon issued upon said judgment directed to the bailiff of said Municipal Court of Chicago, which said judgment was returned no part satisfied; that said judgment was subsequently assigned by the said William Hughes to Harry J. Fireman, the complainant, who is the owner of said judgment.

That said Oliver F. Smith at the time here in question was a banker; he organized the Citizens Trust and Savings Bank in 1905, and became its president. Prior to December 23, 1921, said Smith and said Hughes had various financial dealings with each other; that on December 23, 1921, about one o'clock in the morning, Smith came to the home of Hughes, and told him that it was necessary for him to have $80,000 the following day, because he was in some trouble in the bank. Hughes promised to help him raise the money; he told him that he had $10,000 in cash and Smith suggested that Hughes could procure a loan from the State Bank of Chicago. December 24, 1921, Smith and Hughes by appointment met Maurice Berkson, an attorney, who prior to that time had been attorney for Smith and said Citizens Trust and Savings Bank, but represented Hughes in the transaction in question. Smith agreed to turn over to Hughes as security for the loan, a note guaranteed by the directors of his bank for $30,000; also 301 shares of stock of the Citizens Trust and Savings Bank, and a second mortgage bond for $40,500 on the Spencer building in Chicago. Smith promised to pay all the loan to Hughes within a year. Smith and Hughes went to the State Bank of Chicago with attorney Berkson, where Smith introduced Hughes to one Cox, vice president of the bank, and told Cox that Hughes desired to make a loan; that he would give as security second

the Commercial Times, among other things, that on February 27, 1922, a judgment was entered in the Municipal Court of Chicago in favor of William Hughes and against Oliver T. Smith, in the sum of $38,000.00, which judgment was based on a written judgment note for $40,000 executed by said Oliver T. Smith. Then an execution there upon issued upon said judgment directed to the Sheriff of said Municipal Court of Chicago, which said judgment was returned no part satisfied; that said judgment was subsequently assigned by the said William Hughes to Harry T. Stevens, the complainant, who is the owner of said judgment.

That said Oliver T. Smith at the time here in question was a banker in partnership the Illinois Trust and Savings Bank in Lodi, and doing its business. Prior to December 22, 1922, said Smith and said Hughes had various financial dealings with each other; that on December 22, 1922, there was a balance in the account, said sum in the name of Hughes; and said Smith said that it was necessary for him to have $40,000 the following day, because he was in some trouble in the bank; Hughes promised to help him raise the money; he said he had $40,000 in cash and with assurance that Hughes could procure a loan from the Lake Shore of Chicago. December 24, 1922, said judge by assignment was Hughes Stevens, an attorney, the point to that time had been attorney for Smith and said Illinois Trust and Savings Bank, but represented Hughes in the transaction in question. Said Stevens is sure he spoke to Hughes in security for the loan; a note guaranteed by the directors of the bank for $20,000; also 300 shares of stock of the Illinois Trust and Savings Bank, and a second mortgage bond for $40,000 on the Stevens building in Chicago. Said Stevens to pay all the loan in thirty within a year. Smith and Hughes went to the Lake Bank of Chicago with attorney Hutchins, where Smith introduced Hughes to one Cox, vice president of the bank, and said Cox that Hughes desired to make a loan; that he would give as security second

mortgages on two buildings, one at 5300 Michigan avenue, the other at 5400 Prairie avenue, also the $40,500 Spencer building bond. A few days thereafter the bank agreed to make the loan and the transaction was finally closed by delivering to said State Bank of Chicago a check of Hughes for $10,000, a note signed by Hughes for $70,000, together with the collateral heretofore mentioned. The State Bank of Chicago turned over to Berkson, several notes which said bank held as security for Smith's loan, one of said loans being for $30,000, dated November 28, 1921, another for $20,000, dated June 2, 1921, and another for $25,000, dated September 6, 1921. The stock of said Citizens Trust and Savings Bank was not turned over to Hughes, the only collateral received by him at the time was $40,500 Spencer building bond and said $30,000 note, on which the judgment hereinbefore mentioned was entered. Between December, 1921, and June, 1922, Smith made two payments on account of said indebtedness, one for $3,000, and another for $1,000, making a total of $4,000, which was to apply on said note guaranteed by the directors of the Citizens Trust and Savings Bank.

Hughes was compelled to pay the $70,000 note to the State Bank of Chicago when it became due. In June, 1922, Smith told Hughes that he needed $10,000; that he had $12,000 worth of Motor building bonds; that he would turn the bonds over to Hughes if he would give him $10,000 in addition to what he had already advanced to him. Thereupon, Hughes gave Smith his check for $10,000 and received $12,000 worth of said Motor building bonds. In order to raise the $10,000 Hughes made a loan for $10,000 at the bank and gave his note therefor payable in ninety days. In November, 1922, Smith told Hughes that he could not pay the $80,000 he owed him as he had promised, and stated that he desired to settle the matter; that he would give him the Spencer building bond for $40,500 and the equity in the building located at 91st street and Escanaba avenue, valued at $25,000 being

mortgages on two buildings, one at 22nd Division avenue, the other at 22nd Prairie avenue, also the 4th junior mortgage bond.

A few days thereafter the same agent brought in loan one the transaction was finally issued by delivering to said Hughes part of Chicago a check of Hughes for $15,000, a note signed by Hughes, for $70,000, together with the outstanding mortgages mentioned. The State Bank of Chicago turned over to Hughes, several notes which with bank data as security for Hughes's loan, one of said loans being for $30,000, dated November 18, 1921, another for $25,000, dated June 2, 1921, and another for $12,000, dated September 2, 1921. The check of said Citizens Trust and Savings Bank was not turned over to Hughes, the only collateral received by him at the time was $24,000 junior building bond and $1,000 note, to which the Hughes mortgages were-- signed via endorsement. Between the May, 1921, and June, 1921, with made two payments on account of said indebtedness, one for $2,000, and another for $1,000, leaving a bal. of $4,000, which he is ready to said note guaranteed by the directors of the Citizens Trust and Savings Bank.

Hughes was compelled to pay the $70,000 note to the State Bank of Chicago when it became due. In June, 1922, Hughes told Hughes that he needed $20,000; that he had $12,000 worth of Moser building bonds; that he would turn the bonds over to Hughes if he would give him $20,000 in addition to what he had already received to him. Thereupon, Hughes gave said his check for $20,000 and received $12,000 worth of said Moser building bonds. In order to raise the $20,000 Hughes made a loan for $10,000 at the bank and gave his note therefor payable in ninety days. In November, 1922, Hughes told Hughes that he could not pay the $80,000 he owed him on his promissory, and stated that he desired to notify the matter that he would give him the Tremont building bond for $40,000 and the equity in the building located at 21st street and Wabashaw avenue, valued at $28,000 being

subject to a mortgage of $41,000. On October 14, 1922, Hughes wrote a letter to Smith in which he said: "I am returning herewith note for $30,000, to be signed by you and indorsed by Messrs. Zuber, Cameron, Smyth, Hagaman and Staver. This note is a renewal of note given me by you and indorsed by your directors as collateral for loan secured by me for you from State Bank of Chicago December 24, 1921. Sign this new note and have it indorsed at once. On receipt of same I will have old note cancelled and returned to you."

In the early part of November, 1922, Hughes and Smith came to Berkson's office with a statement of their various transactions in connection with the loans, and Hughes stated that he had settled his matters with Smith as well as he could, under the circumstances, and that he, Hughes, was to have the property at 91st street and Escanaba avenue; that he, Hughes, was to have the Motor building bonds and the Spencer building bond, and that he, Hughes, was allowed a discount of $4,000 on the Spencer bond and a discount of $2,000 on the Motor building bond, and that he, Hughes, was to retain the $30,000 note indorsed by the directors of the bank, on which $4,000 had been paid. Smith and Hughes informed Berkson that they had agreed on all of the items, and that the balance due Hughes after the adjustment of the various debits and credits was $19,008.57, for which a new note was to be signed by Smith and indorsed by the directors of the said Citizens Trust and Savings Bank. A note for that amount was drawn by Berkson and given to Smith, who was to procure the necessary signatures thereon; said directors were also to guarantee Hughes against loss on notes which he had indorsed at the bank. A statement showing the various debits and credits was prepared and submitted by Hughes and Smith, as follows:

subject to a mortgage of $11,[illegible]. On October 14, 1921, Hughes wrote a letter to Smith in which he said "I am returning herewith note for $20,000, to be signed by you and indorsed by Mordecai Ishmael, Esquire, Hughes and Hughes. This note is a renewal of note given me by you and indorsed by your directors to substantial for loan received by me for you from State Bank of Chicago November 24, 1921. Also this new note and have it indorsed at once. On receipt of same I will have old note cancelled and returned to you."

In the early part of November, 1921, Hughes and Smith came to Berkman's office with a statement of their various transactions in connection with the loans, and Hughes stated that he had settled his matters with Smith as well as he could, under the circumstances, and that he, Hughes, was to have the [illegible] of first mortgage property; that he, Hughes, was to have the Motor Building bonds and the Pressey Building bond, and that he, Hughes, was allowed a discount of $4,000 on the Spencer bond and a discount of $2,000 on the Motor Building bond, and that he, Hughes, was to retain the $20,000 note indorsed by the directors of the bank, on which $4,000 had been paid. Smith and Hughes informed Berkman that they had agreed on all of the items, and that the balance due Hughes after the adjustment of the various claims and credits was $1,[illegible].37, for which a new note was to be signed by Smith and indorsed by the directors of the said Citizens Trust and Savings Bank. A note for that amount was drawn by Berkman and given to Smith, who was to procure the necessary signatures thereon; said directors were also to exonerate Hughes against loss on notes which he had indorsed at the bank. A statement showing the various debits and credits was prepared and submitted by Hughes and Smith, as follows:

"State Bank of Chicago - Balance due.....	$60,000.00	
Citizens Bank - Note.....	10,000.00	
Citizens Bank - Note.....	10,000.00	
Citizens Bank - Note.....	3,567.50	
Debit 91st St. Bldg.....	2,311.90	
Citizens Bank - Int. Paid.....	54.83	
Citizens Bank - Int. paid.....	161.42	
Atty. Fee and Expense - 91st Loan.....	119.17	
Spencer Bonds - $40,000.....		$36,500.00
Motor Bonds - $12,000.....		10,000.00
Equity 91st St. Bldg.....		25,000.00
Int. Spencer Bonds to 10/1/22.....		708.75
Int. Spencer Bonds 10/1/12/1/22.....		472.50
Int. Motor Bonds to 10/16/22.....		420.00
Int. Motor Bonds 10/16-12/1/22.....		105.00
Directors' Note.....		19,008.57
	$92,214.82	$92,214.82"

At the time of said agreement between Hughes and Smith in Berkson's office in November, 1922, the property at 91st street and Escanaba avenue was discussed, and Berkson inquired whether it was necessary to draw any conveyances or documents in connection therewith. Berkson suggested that if Hughes had title, it might be well to reconvey to Smith and have Smith execute another deed to Hughes, and Berkson prepared the deeds and gave them to Hughes, but afterwards Smith told him that the deeds were torn up, that Hughes already had title and that it was not necessary to make any further conveyance. The court further found that Hughes did not execute any deed conveying the property to Smith prior to the month of December, 1922, when said deed was prepared by Berkson for the signature of Hughes; that a deed was to be signed by Hughes and wife, reconveying the property to Smith, and another deed reconveying the property by Smith to Hughes was prepared for the signatures of Smith and his wife; that said deeds were then destroyed by Smith, who stated that it was not necessary to reconvey the said property, as the title was already vested in Hughes. The court further found that the statements of collections of rents and expenditures made by Hughes were submitted to Smith up to and including November 30, 1922. On said date the balance due Hughes, amounting to $2,311.90, appeared on said statement and said

State Bank of Chicago - Balance due	[illegible]
Fidelity Bank - Int.	[illegible]
Fidelity Bank - Int.	[illegible]
Fidelity Bank - Int.	[illegible]
Peoples Nat'l Bk. Aug.	[illegible]
Fidelity Trust - Int. Jan.	[illegible]
Fidelity Bank - Int. Jan.	[illegible]
Fidelity, The Ad Company - Bal. Due	[illegible]
Premier Bonds - [illegible]	[illegible]
Motor Bonds - [illegible]	[illegible]
Paying Wire Co. Bldg.	[illegible]
Int. Premier Bonds [illegible]	[illegible]
Int. Premier Bonds [illegible]	[illegible]
Int. Motor Bonds [illegible]	[illegible]
Int. Paper Bonds [illegible]	[illegible]
Stockyards' Stabilization [illegible]	[illegible]
	[illegible]

At the time of said agreement between Hughes and Smith in Barnes's office in December, 1920, the property at Blue Island and Ravenswood avenues was discussed, and Erickson inquired whether it was necessary to have any conveyances or documents in connection therewith. Erickson suggested that if Hughes had title, it might be well to convey to Smith and have Smith execute another deed to Hughes, and Erickson prepared the deeds and gave them to Hughes, but afterwards Smith told him that the deeds were torn up, that Hughes already had title and that it was not necessary to make any further conveyance. The court further found that Hughes did not execute any deed conveying the property to Smith prior to the month of December, 1922, when said deed was prepared by Erickson for the signature of Hughes; that a deed was to be signed by Hughes and wife, reconveying the property to Smith, and another deed reconveying the property by Smith to Hughes was prepared for the signature of Smith and his wife; that said deeds were then destroyed by Smith, who stated that it was not necessary to reconvey the said property, as the title was already vested in Hughes. The court further found that the statements of salaries of $[illegible] was approximately made by Hughes and were submitted to Smith up to and including December 30, 1922. In said date the salaries due Hughes, amounting to $[illegible], appeared as said statement and said

balance was included in the statement having the various debits and credits agreed upon by the parties in December, 1922. Since November 30, 1922, no statements were rendered by Hughes and none was ever requested by Smith, and since that time Smith made no claim against Hughes for said property. The mortgage indebtedness on said property became due in 1926, and was renewed by Hughes, and the court concluded that under the terms of said agreement the equity in said property at 91st street and Escanaba avenue, Chicago, was taken by Hughes at a valuation of $25,000, and that said Smith was not entitled to any rents therefrom since November 30, 1922.

The court found that by a prior decree entered in said cause, the judgment had not been paid or in any way satisfied at any time between February 27, 1925, and June 2, 1927, and that no part of said judgment has been paid or satisfied since June 2, 1927; that on November 28, 1922, upon a conclusion of the settlement between William Hughes and Oliver F. Smith at the office of attorney Berkson, there was due and owing from said Oliver F. Smith to said Hughes, $19,[illegible].75, and the court found that there was that sum due from Smith to Complainant by virtue of the assignment of the judgment hereinabove named, plus interest at six per cent per annum from November 28, 192[illegible], plus all costs and attorneys' fees incurred by the complainant in procuring judgment upon said note for $30,000. The court also found that Oliver F. Smith claimed to be the owner of 301 shares of the capital stock of the Citizens Trust and Savings Bank of Chicago, Illinois, which he had delivered to Harry B. Staver; also that Oliver F. Smith had a suit pending in the Circuit Court of Cook County against William Hughes for an accounting and that said suit constitutes a chose in action, and that whatever interest Oliver F. Smith had in said suit is subject to the lien of the judgment of the complainant above mentioned, and by the decree reappointed the Union State Bank of Chicago as receiver of all the assets of every kind, nature and description,

judgment was obtained in the proceeding during the pendency of the suit, and execution issued upon it by the parties in December, 1922. Since November 30, 1922, no statements were rendered by Hughes and none was ever requested of Hughes, and since that time Smith made no claim against Hughes for said property. The assignee instructed us that property proceeds had in fact, and was received by Hughes, and the court established that under the terms of said agreement the equity in said property at that date and thereafter, Chicago, was taken by Hughes at a valuation of $25,000, and that said Smith was not entitled to any further shortcuts since November 30, 1922.

The court found that by a prior decree entered in said cause, the judgment had not been paid or in any manner satisfied at any time before February 27, 1923, and that, and that on part of said judgment had been paid on satisfied after June 2, 1927, that on November 30, 1922, upon a settlement of the relationship between William Hughes and Oliver P. Smith in the office of attorney Hutchson, there was due and owing from said Oliver P. Smith to said Hughes, $17,[illegible]7, and the court found that there was still due from Smith to complainant by virtue of the assignment of the judgment hereinabove named, plus interest at six per cent per annum from November 30, 1922, plus all costs and attorney' fees incurred by the complainant in procuring judgment upon said note for $30,000. The court also found that Oliver P. Smith claimed to be the owner of 321 shares of the capital stock of the Illinois Trust and Savings Bank of Chicago, Illinois, which he had delivered to Harry S.Stevenson plus Oliver P. Smith had a suit pending in the circuit court of Cook County against William Hughes for an accounting and that said suit constitutes a chose in action, and that whatever interest Oliver P. Smith had in said suit is subject to the lien of the judgment of the complainant above mentioned, and by the decree impounded the Union Trust Bank of Chicago as receiver of all the assets of every kind, nature and description,

real, personal and mixed, belonging to Oliver F. Smith, and directed Oliver F. Smith to assign, turn over and delivered to the receiver all of his right, title and interest in and to the 301 shares of the capital stock of the Citizens Trust and Savings Bank of Chicago, Illinois, and in and to the chose in action pending in the Circuit Court of Cook County entitled Oliver F. Smith v. William Hughes.

Many points are urged by defendant as grounds for a reversal of the decree. It is claimed the decree should be reversed because the chancellor treated the interlocutory decree as a binding former adjudication, and that the interlocutory decree should be given no weight on a final hearing. We have examined the cases cited as well as the evidence in the instant case, and are of the opinion they are not applicable for the reason that in the cases cited the court, after the entry of the interlocutory decrees in those cases, refused to permit the parties to offer or consider any evidence in support of their contentions (Price v. Springer, 241 Ill. 230, 235), while in the instant case the court did not reject any testimony offered on any question passed upon by the interlocutory decree, and the court had before it all of the testimony taken on the first reference as well as on the second reference. It is apparent from this record that the court did not consider it was bound by the interlocutory decree and that the final decree that was entered was based on all of the evidence heard by the master which was before the court at the time of the entry of the decree appealed from.

Defendant contends that the findings that William Hughes is still the owner of the 91st street property and that defendant has no interest therein, and that no settlement transferring title to this property or the collateral to Hughes was shown, are not justified by the evidence. It is true, the evidence is conflicting, but an examination of the entire record convinces us that the

trust, proceed and share, belonging to Oliver T. Smith, and directed Oliver T. Smith to sell, turn over and deliver to the receiver all of his right, title and interest in and to the 111 shares of the capital stock of the Hillsboro Trust and Savings Bank of Hillsboro, Illinois, and to and by the above is action pending in the Circuit Court of Cook County entitled [Oliver T. Smith v. William Hughes].

Many points are urged by defendant as grounds for a reversal of the decree. It is claimed the court should be reversed because the chancellor treated the interlocutory decree as a binding former adjudication, and that the interlocutory decree should be given no weight on a final hearing. We have examined the cases cited as well as the evidence in the instant case, and one of the opinions they are not applicable for the reason that in the cases cited the court, after the entry of the interlocutory decrees in those cases, refused to permit the parties to offer or consider any evidence in support of their contentions (Price v. Hawkshaw, 141 Ill. 489, 498), while in the instant case the court did not reject any testimony offered on any question passed upon by the interlocutory decree, and the court had before it all of the testimony taken on the first reference as well as on the second reference. It is apparent from this record that the court did not consider it was bound by the interlocutory decree and that the final decree that was entered was based on all of the evidence heard by the master which was before the court at the time of the entry of the decree appealed from.

Defendant contends that the finding that William Hughes is still the owner of the 111 shares of the Hillsboro Trust and Savings Bank is improper therein, and that as mentioned hereinbefore title to this property on the assignment to Hughes was shown, are not justified by the evidence. It is true, the evidence is conflicting, but an examination of the entire record convinces us that the

chancellor was justified in the findings, it appearing from the evidence that the defendant was a banker and in 1905, organized the Citizens Trust & Savings Bank and became its president. Smith and Hughes had various financial dealings with each other. December 23, 1921, Smith came to Hughes' home and said that it was necessary for him to have $80,000 because he was in financial trouble. Hughes agreed to assist him, telling him that he (Hughes) had $10,000 in cash. Smith suggested that Hughes could procure a loan from the State Bank of Chicago. On the following day they met Maurice Berkson, an attorney. At that meeting, Smith agreed to turn over to Hughes as security for an $80,000 loan, his note guaranteed by the directors of said Citizens Bank for $30,000; also 301 shares of the stock of said bank, and a second mortgage bond of $40,500 on the Spencer building in Chicago, and further agreed to pay back the loan to Hughes within a year. Thereupon, Smith, Hughes and Berkson interviewed an official of the State Bank with the result that the bank decided to and did loan $80,000, receiving at the time from Hughes his check for $10,000 and his note for $70,000, and collateral security as follows: second mortgageson two buildings, and the $40,500 Spencer building bond. The bank turned over to Berkson several notes which it held as security for Smith's loan - one of them being "a note for $30,000, dated November 28, 1921," another for $20,000, dated July 2, 1921, and another for $20,000, dated September 6, 1921, but the stock of the Citizens Bank was not turned over to Hughes, and the only collateral received by him was said $40,500 Spencer building bond and said $30,000 note. Hughes was compelled to pay at its maturity said $70,000 note. In June, 1922, Smith told Hughes he needed $10,000, that he had $12,000 worth of Motor building bonds, and that he would turn over these bonds to Hughes if he (Hughes) would give him $10,000 "in addition to what he had al-

[illegible] was involved in the lawsuit, is adjusting from the [illegible] claimed that the defendant was a banker and in 1900, organized the Citizens First & Savings Bank and became its president. Until the Hughes had various financial dealings with such other [illegible] 21, 1903, Smith sent to Hughes[illegible] that it was necessary for him to have $25,000 because he was in financial trouble. Hughes agreed to assist him, telling him that he (Hughes) had $20,000 in cash. Smith suggested that Hughes could procure a loan from the Union Bank of Chicago. [illegible] the Plaintiff's [illegible] Hughes Bank-non, an attorney. At that meeting, Smith agreed to turn over to Hughes as security for an $25,000 loan, his note guaranteed by the directors of said Citizens Bank for $20,000; also 501 shares of the stock of said bank, and a second mortgage bond of $40,000 on the Spencer building in Chicago, and further agreed to pay back the loan to Hughes within [illegible] a year. Thereupon, Smith, Hughes and Hughes [illegible] of the State Bank with the result that the bank decided to and did loan $20,000, receiving as the line from Hughes his check for $10,000 and his note for $10,000, and collateral security as follows: second mortgages on two buildings, and the $40,000 Spencer building bond. The bank turned over to Hughes several notes which it held as security for Smith's loan - one of them being "a note for $20,000, dated November 28, 1921," another for $20,000, dated July 8, 1921, and another for $20,000, dated September 6, 1921, but the stock of the Citizens Bank was not turned over to Hughes, and the only collateral received by him was said $40,000 Spencer building bond and said $20,000 note. Hughes was compelled to pay it its maturity said $20,000 note. In June, 1922, Smith said Hughes he needs $10,000, that he had $12,000 worth of Motor building bonds, and that he would turn over these bonds to Hughes if he (Hughes) would give him $1,000 "in addition to what he had al-

ready advanced him." Thereupon, Hughes gave to Smith his check for $10,000 and received from Smith $12,000 worth of said Motor building bonds. It further appears from the evidence that in November, 1922, Smith stated to Hughes that he "could not pay to him the $80,000 that he owed him," and further stated that "he desired to settle the matter, that he would give to him (Hughes) the Spencer building bond of $40,500, and also the equity in a building located at 91st street and Escanaba avenue valued at $25,000," on which there was a mortgage of $41,000. About this time Smith and Hughes showed Berkson a written statement of their various transactions concerning the $80,000 loan and Hughes stated "that he had settled his matters with Smith as well as he could under the circumstances; that he (Hughes) was to have the property at 91st street and Escanaba avenue and the Motor building bonds and the Spencer building bond and he was to retain the $30,000 note indorsed by the directors and on which $4,000 had been paid." At this interview both Smith and Hughes informed Berkson that "they had agreed on all of the items and that the balance due to Hughes, after adjustment of the various debts and credits, was $19,008.57, for which a new note was to be signed by Smith and indorsed by the directors of said Citizens Bank." A note for $19,008.57 was drafted by Berkson and given to Smith, who was to procure the necessary signatures thereon, and there was a discussion concerning the 91st street property. Berkson inquired whether it was necessary to draw any conveyances or documents in connection therewith, and suggested that if Hughes already had title thereto it might be well for him to reconvey to Smith and have Smith execute another deed to Hughes. Berkson prepared the deeds and gave them to Hughes, but Smith subsequently told him (Berkson) that they "had been torn up," and for the reason that "Hughes already had title and it was unnecessary to make other conveyances."

The defendant's next contention is that a fiduciary relation existed between him and William Hughes. A fiduciary relation exists

[illegible] [illegible]." [illegible] Hughes gave as reason his about for $10,000 and priority from March 21[illegible] [illegible] at mid-Rotor building [illegible]. It further appears from the evidence that in December, 1929, Smith stated to Hughes that he "could not pay [illegible] the $20,000 that he owed him," and further stated that "he desired to retain the market, that he would give to him (Hughes) the Spencer building [illegible] of $40,000, and also his equity in a building located on [illegible] and Lessards avenue valued at $20,000," he which there was a mortgage of $41,000. About this time Smith and Hughes showed Erickson a written statement of their various transactions concerning the $80,000 loan and Hughes stated "that he had settled his matters with Smith as well as he could under the circumstances; that he (Hughes) was to have the property at 91st street and Lessards avenue and the Spencer building [illegible] and the Spencer building [illegible] and he was to retain the $20,000 note [illegible] by the directors and on which $4,000 had been paid." At this interview both Smith and Hughes informed Erickson that "they had agreed on all of the items and that the balance due to Hughes, after adjustment of the various debts and credits, was $32,[illegible].37, for which a new note was to be signed by Smith and indorsed by the directors of said Citizens Bank." A note for $32,[illegible].37 was drafted by Erickson and given to Smith, who was to procure the necessary directors' indorsements, and there was a discussion concerning the 91st street property. Erickson inquired whether it was necessary to draw any conveyance or documents in connection therewith, and was asked that if Hughes already had title thereto it might be well for him to reconvey to Smith and have Smith reconvey another deed to Hughes. Erickson prepared the deeds and gave them to Hughes, but Smith subsequently said his (Erickson) that they "had been torn up," and for the reason that "Hughes already had title and it was unnecessary to make other conveyances."

The witness's main testimony is that a fiduciary relation existed between him and William Hughes. A fiduciary relation exists

in all cases in which there is confidence reposed on one side and a resulting superiority and influence on the other. The origin of the relation is immaterial. If the confidence in fact exists and is reposed by the one party and accepted by the other, the relation is fiduciary and equity will regard dealing between the parties according to the rules which apply to such relation. (Feeney v. Munyan, 316 Ill. 246.) The relation being established, the burden rests on the beneficiary of the act to show by clear and convincing proof not only that the transaction was fair but that it did not proceed from a betrayal of confidence (McCord v. Roberts, 334 Ill. 233), and it exists between principal and agent. (Mors v. Peterson, 361 Ill. 532.) The contention of the defendant is, that from the record it appears that Hughes sustained the relation of agent to defendant, managing the 91st street property, collecting the rents thereof and accounting for the same as agent, and the actual reposing of trust and confidence in Hughes by defendant in having the property deeded to Hughes to hold for defendant without having anything to show therefor. Notwithstanding the law views with distrust transactions whereby a party having the confidence of the other obtains property, the distrust or suspicion may be shown to be unfounded, and will be removed and the transaction regarded as valid if it be made to appear it was entered into with full knowledge of its nature and effect, and was the result of deliberate, voluntary and intelligent desire of the party acting, and was not secured by the exercise of the influence engendered as an effect of the relation. (Kellogg v. Peddicord, 181 Ill. 22; Roche v. Roche, 286 id. 556; Neagle v. McMullen, 334 id. 168, 176.) It appears from this record that defendant was a banker who had helped organize the Citizens Trust & Savings Bank in 1905, and became and was its president until 1921, when it was discovered he had overissued the bank's stock by 283 shares; that he resigned as president but remained a director of

[illegible] a resulting superiority and influence on the other. The origin of the relation is immaterial. If the confidence in fact exists and is imposed by the dominant and accepted by the other, the relation is fiduciary and equity will regard dealing between the parties according to the rules which apply to such relations. (Pease v. Pease, 111 Ill. 466.) The relation being established, the burden rests on the beneficiary of the act to show by clear and convincing proof not only that the transaction was fair but that it did not proceed from a betrayed or confidence (Hickey v. Coberly, 214 Ill. 481), nor is equity against criminal and equal. (Pease v. Pease, 111 Ill. 466.) The contention of the defendant is, that from the record it appears that Hughes sustained the relation of agent in defendant, managing the Oak street property, collecting the rents thereof and accounting for the same as agent, and the actual repairing of roofs and confidence in Hughes by defendant in having the property traded to Hughes to hold for defendant without having anything in the transfer. Notwithstanding the law views with distrust transactions whereby a party having the confidence of the other obtains property, the distrust or suspicion may be shown to be unfounded, and will be removed and the transaction regarded as valid if it be made to appear it was entered into with full knowledge of its nature and effect, and not the result of duplicity, voluntary and intelligent assent of the party acting, and was not secured by the exercise of the influence engendered as an effect of the relation. (Gillespie v. Gillespie, 144 Ill. 32; Keane v. Moore, 144 Id. 328; Murphy v. Murphy, 224 Id. 160, 164.) It appears from this record that defendant was a banker who had helped organize the Gilliams Trust & Savings Bank in 1903, and became and was its president until 1921, when it was discovered he had overdrawn the bank's stock by 200 shares; that it induced the president but resumed a director of

the bank for several months, when he left the bank and entered the real estate business, and when the facts before stated are considered we are led to the conclusion that the settlement arrived at between defendant and Hughes was the result of deliberate, voluntary and intelligent action on the part of the defendant and was not secured by the exercise of any influence on the part of Hughes.

We have considered the argument of defendant's counsel that evidence of fraud is to be found in an alleged discrepancy between the value of the 91st street property and the price at which it was accepted by Hughes in settlement of his accounts with defendant, as well as the claim that Hughes retained the notes and collateral and later sought to enforce the indebtedness for a larger amount, and that the rents and proceeds of the collateral were sufficient to satisfy the indebtedness, and that Hughes received the shares of bank stock as collateral, and find no merit therein. We are of the opinion that the trial court had jurisdiction to make its finding and decree with reference to the suit for an accounting pending in the Circuit Court between the defendant in the instant case and William Hughes, and we have considered the contention that the procuring of the judgment in the Municipal court of Chicago for an excessive amount was a fraud upon the court entering the judgment, and are mindful of the maxim that fraud vitiates every transaction into which it enters and applies to judgments as well as contracts. As before stated, the judgment of the Municipal court was for $32,403.60. The Superior court found there was due on this judgment $19,008.57. On the hearing of this cause the complainant claimed that there was due him more than $19,008.57. We cannot hold that solely because the court found that there was but $19,008.57, plus interest, costs and attorneys' fees since February 27, 1925, due the complainant, the complainant should be deprived of the amount that is actually due him.

the bank for several months, even on lent the bank and executed the real estate mortgage, and when the facts before which are considered we are led to the conclusion that the mortgagee acted in behalf defendant and Hughes was the result of mistake, voluntarily and intelligent action on the part of the defendant and was not occasioned by the negligence or any influence on the part of Hughes.

We have established the ownership of defendant's tenant that evidence of fraud is to be found in an alleged discrepancy between the value of the first street property and the price at which it was accepted by Hughes in settlement of his accounts with defendant, as well as the claim that further receipts the rents and collected and that should be applied to the indebtedness for a larger amount, and that the rents and proceeds of the collateral were sufficient to satisfy the indebtedness, and that Hughes received the balance of bank stock as collateral, and that he merit therein. We are of the opinion that the trial court had jurisdiction to make its finding and decree with reference to the suit for accounting pending in the Circuit Court between the defendant in the instant case and William Hughes, and we have considered the contention that the procuring of the judgment in the Municipal Court of Chicago for an excessive amount was a fraud upon the court entering the judgment, and are mindful of the maxim that fraud vitiates every transaction into which it enters and applies to judgments as well as contracts. As before stated, the judgment of the Municipal court was for $[illegible],100.00. The Superior court found there was due on this judgment $[illegible],000.37. At the hearing of this cause the complainant claimed that there was due him more than $[illegible],000.37. We cannot hold that safely because the court found that there was but $[illegible],000.37. Prior interest, under al-Iterest' Act, since January 27, 1920, on the complainant, the complainant should be deprived of the amount that is actually due him.

It is claimed that the court erred in rulings on the admissibility of evidence, primarily in sustaining complainant's objection to the question put to defendant as to the value of the 91st street property, defendant offering to prove it was worth $100,000; and to the question put to Hughes asking what amount of rent Hughes collected between February 27, 1925, and June 1, 1927, and subsequent to the last statement that Hughes rendered to defendant. If we are correct, as we think we are, in holding that a settlement had been made, as before stated, whereby Hughes was to have the 91st street property at a valuation of $25,000, proof of a greater value and the rents collected after the settlement was made would be immaterial, and no error was committed in sustaining the objections.

After considering the entire record and the remaining arguments of defendant's counsel, we are of the opinion that the decree of the Superior court should be affirmed, and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

It is claimed that the court erred in ruling on the admissibility of evidence, primarily in sustaining appellee's objection to the question put to defendant on the trial of the first above proceeding, directed affecting the point in his notice [illegible] and in the question put to Charles Miller that consist of just Engine collapsed between [illegible] 17, 1919, and June 2, 1917, and measurement on the last occurrence that Engine produced no [illegible]. If we are correct, as we think we are, in holding that a settlement has been made, or before claim, thereby Engine was in fact the full agreed property in a valuation of $12,000, proof of a greater value and the needs collected after the settlement was made would be immaterial, and we refer the commission in sustaining the objections.

After considering the quality [illegible] and the remaining arguments of defendant's counsel, we are of the opinion that the decree of the Superior Court should be affirmed, and it is so ordered.

ATTEST:

Dunham, C. J., and Sullivan, J., concur.

34583

MICHAEL M. EGAN,
Appellee,

vs.

CARLOS AMES, ARCHIBALD J. CAREY and EDWARD J. DENEMARK, as Civil Service Commissioners of the City of Chicago,
Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

261 I.A. 641

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Respondents appealed from a judgment for petitioner, Michael M. Egan, in a proceeding wherein by writ of certiorari the latter sought to have his discharge from the Police Department of the City of Chicago declared null and void. After the writ of certiorari had issued the respondents made return by filing their record, and moved the court to quash the writ of certiorari and to dismiss the petition on the grounds inter alia that the return of the respondents shows on its face that respondents in the matter complained of had jurisdiction of the person of the petitioner; that the return shows on its face that the finding made by the respondents was a finding in all respects legal and valid, based upon written charges, a hearing had thereon and participated in by petitioner and his counsel, and a finding of fact made from the evidence and that said return shows on its face such laches that said petitioner by his laches of more than six months in filing his petition, is estopped to question the legality of the proceedings of the respondents as set forth in said return. The court overruled the motion and sustained the motion of the petitioner to quash the record and found that the Civil Service Commission of the City of Chicago was without jurisdiction to order the discharge of the petitioner from his office as patrolman. By this appeal the respondents seek the reversal of this order.

Interlocutory appeals from a judgment for petitioner.

Michael M. Ogw, in a proceeding according by writ of certiorari the latter sought to have his discharge from the Police Department of the City of Chicago declared null and void. After the writ of certiorari had issued the respondents made return by filing their answer, and moved the respondents made return by filing their answer, and moved to quash the writ of certiorari and to dismiss the petition on the grounds inter alia that the return of the respondents showed on its face that respondents in the matter complained of had jurisdiction of the person of the petitioner; that the return shows on its face that the finding made by the respondents was a finding in all respects legal and valid, based upon written charges, a hearing had thereon and participated in by petitioner and his counsel, and a finding of fact made from the evidence and that said return shows on its face such findings that said petitioner by his laches of more than six months in filing his petition, is estopped to question the legality of the proceedings of the respondents as set forth in said return. The court overruled the motion and sustained the petition of the petitioner to quash the record and found that the Civil Service Commission of the City of Chicago was without jurisdiction to order the discharge of the petitioner from his office as patrolman. By this appeal the respondents seek the reversal of this order.

The petitioner has not appeared or filed a brief in this court.

Petitioner was a patrolman in the Police Department of the City of Chicago. On September 17, 1924, he was notified that on September 15, 1924, charges had been made against him of violating paragraphs 1, 4 and 18 of Section 1, Rule 30, Rules and Regulations of the Department of Police, prescribed and in force November 1, 1910. (1) Intoxication. (2) Conduct unbecoming a police officer. (3) Insubordination or disrespect toward a superior officer. The charges specified that at about 11:10 P. M., on September 7, 1924, petitioner was found at the Checker Cab Garage, 5862 Broadway, in an intoxicated condition by Sergeant Charles M. Mueller of headquarters, and that petitioner pulled his revolver and fired one shot at the abdomen of Sergeant Mueller, which went wild, and he was then disarmed. From the record it appears that upon the hearing of these charges the petitioner was present and represented by counsel throughout the proceedings and participated in the examination of witnesses; that all the witnesses were sworn and testified and upon such evidence the Civil Service Commission found the petitioner guilty of violating paragraphs 1, 4 and 18 of Section 1, Rule 30, Rules and Regulations of the Department of Police, prescribed and in force November 1, 1910. (1) Intoxication. (2) Conduct unbecoming a police officer. (3) Insubordination or disrespect toward a superior officer, and specifically set forth that said petitioner, a patrolman in the Police Department of Chicago, Illinois, assigned to the 33rd District Police Station, on the night of September 7, 1924, was assigned from 4 P. M., until 12 o'clock, midnight, to guard duty at the Checker Cab Garage, located at 5862 Broadway, Chicago; that about 11 o'clock P. M., on September 7, 1924, Charles Mueller, Sergeant of Police of said Department of Police, who was a superior officer of said patrolman, Michael M. Egan, in the performance of his duty as roundsman -

The petitioner has not appeared or filed a brief in this court.

Petitioner was a patrolman in the Police Department of the City of Chicago. On September 17, 1924, he was notified that on September 18, 1924, charges had been made against him of violating paragraphs 1, 4 and 18 of Section 1, Rule 30, Rules and Regulations of the Department of Police, prescribed and in force December 1, 1922: (1) Intoxication. (4) Conduct unbecoming a police officer. (18) Insubordination or disrespect toward a superior officer. The charges specified that at about 11:10 P. M., on September 7, 1924, petitioner was found at the Chicago Cab Garage, 5322 Broadway, in an intoxicated condition by Sergeant Charles M. Smith of headquarters, and that petitioner called his superior and fired one shot at the uniform of Sergeant Smith, which went wild, and he was then disarmed. Upon the record it appears that upon the hearing of these charges the petitioner was present and represented by counsel throughout the proceedings and participated in the examination of witnesses; that all the witnesses were sworn and testified and upon such evidence the Civil Service Commission found the petitioner guilty of violating paragraphs 1, 4 and 18 of Section 1, Rule 30, Rules and Regulations of the Department of Police, prescribed and in force December 1, 1922: (1) Intoxication. (4) Conduct unbecoming a police officer. (18) Insubordination or disrespect toward a superior officer, and specifically set forth that said petitioner, a patrolman in the Police Department of Chicago, Illinois, assigned to the 32nd District Police Station, on the night of September 7, 1924, was assigned from 4 P. M., until 12 o'clock, midnight, to guard duty at the Chicago Cab Garage, located at 5322 Broadway, Chicago; that about 11 o'clock P. M., on September 7, 1924, Charles Smith, Sergeant of Police of said Department of Police, who was a superior officer of said patrolman, Michael E. Ryan, in the performance of his duty as roundsman -

started from Police Headquarters, called at said Checker Garage at said street and number, and then and there found the said Michael M. Egan standing at the door of said garage; that at said time and place the said Michael M. Egan's breath smelt of intoxicating liquor, his knees were weak, he could not talk coherently, he was intoxicated and was in no condition to do police duty, and thereupon, at said time and place the said Sergeant Charles Mueller telephoned the said 33rd Police District Station to send the patrol wagon to the said Checker Garage; that while waiting at the said time and place for the arrival of the said patrol wagon, the said Sergeant Charles Mueller was standing at the entrance to said garage talking to an employee of said Checker Garage when the said patrolman Michael M. Egan then and there said to the said Sergeant Mueller, whom he knew to be his superior officer, "So you think you are going to get away with this?" and the said Michael M. Egan then and there pointed the revolver at the abdomen of the said Sergeant Mueller who immediately struck with his hand at the said revolver and at the same time the said Michael M. Egan pulled the trigger of said revolver, firing same, and the bullet passed by said Sergeant Mueller and the said revolver was knocked to the floor against the wall of the said garage; that the said revolver was then and there secured by the said Sergeant Mueller and the said Patrolman Michael M. Egan was thereupon sent in to said 33rd District Police Station in the patrol wagon, and it was ordered that he be discharged from the Police Department.

The record shows all the necessary legal steps under Sec. 12, Chap. 24, Cahill's Ill. Stats. 1929, par. 697, including the charges and specifications, proof of service, appearance of the accused with counsel, the evidence in the case and the finding that he was guilty. It is only where the jurisdictional facts do not appear of record that the Circuit court would be justified in

started from Police Headquarters, called at said Chester Garage at said street and number, but does not since found the said Alonzo H. Egan standing at the door of said garage; that at said time and place the said Alonzo H. Egan's breath smelt of intoxicating liquor, his eyes were red, he could not talk coherently, he was intoxicated and was in no condition to do police duty, and thereupon, at said time and place the said Sergeant Charles Bussler telephoned the said 32nd Police District Station to send the patrol wagon to the said Chester Garage; that while waiting at the said time and place for the arrival of the said patrol wagon, the said Sergeant Charles Bussler was standing at the entrance to said garage talking to an employee of said Chester Garage when the said patrolman Alonzo H. Egan came and there said to the said Sergeant Bussler, when he knew to be his superior officer, "Do you think you are going to get away with this?" and the said Alonzo H. Egan then and there pulled the revolver at the abdomen of the said Sergeant Bussler who immediately struck with his hand at the said revolver and at the same time the said Alonzo H. Egan pulled the trigger of said revolver, firing same, and the bullet passed by said Sergeant Bussler and the said revolver was knocked to the floor against the wall of the said garage; that the said revolver was then and there secured by the said Sergeant Bussler and the said Patrolman Alonzo H. Egan was thereupon sent in to said 32nd District Police Station in the patrol wagon, and it was ordered that he be discharged from the Police Department.

The record shows all the necessary legal elements under Ill. St. Chap. 24, Para. 1-69, Ill. Stats. 1937, par. 697, including the charges and specifications, proof of service, appearance of the accused with counsel, the evidence in the case and the finding that he was guilty. It is only where the jurisdictional facts do not appear of record that the Circuit court would be justified in

quashing the record for want of jurisdiction in the commission. (Funkhouser v. Coffin, 301 Ill. 257; People ex rel. Holland v. Finn, 247 Ill. App. 53; Cord v. Coffin, 226 Ill. App. 326; Buttimer v. Geary, 229 Ill. App. 524.) A reviewing court will not decide whether a Civil Service Commission decided rightfully or wrongfully in removing a policeman from duty, but only whether it had jurisdiction and did so in the legal manner. (People ex rel. Mitchell v. City of Chicago, 243 Ill. App. 100.)

It is also urged that the petitioner was guilty of laches. He was discharged September 25, 1924, and filed his petition for writ of certiorari on May 26, 1930, more than five years thereafter. (People ex rel. Holland v. Finn, 247 Ill. App. 53.) It has been repeatedly held that, where one is discharged by the Civil Service Commission and delays more than six months before filing his petition of certiorari, he is guilty of laches, which bars his right to have the writ issue. (People ex rel. Holland v. Finn, supra, and cases cited.) The judgment of the Circuit court of Cook county quashing the record of the Civil Service Commission is reversed and the writ of certiorari is quashed and the petition dismissed.

JUDGMENT REVERSED AND WRIT OF CERTIORARI QUASHED AND PETITION DISMISSED.

Scanlan, P. J., and Gridley, J., concur.

granting the prayer for writ of injunction in the complaint.
(People ex rel. Griffin, 5N 121, 207; People ex rel. Hallinan v. Klum, 247 Ill. App. 82; Ford v. Griffin, 295 Ill. App. 322; Stirling v. Swan, 23N Ill. App. 424.) A preliminary court will not decide whether a first service Constitutes double jeopardy or wrongfully in removing a policeman from duty, but only whether it had jurisdiction and did so in the legal manner. (People ex rel. Wilmott v. City of Chicago, 241 Ill. App. 329.)

It is also urged that the petitioner was guilty of laches. He was discharged September 28, 1944, and filed his petition for writ of certiorari on July 24, 1945, more than five years thereafter. (People ex rel. Jelinek v. Klum, 317 Ill. App. 83.) It has been repeatedly held that, where one is discharged by the Civil Service Commission and delays more than six months before filing his petition of certiorari, he is guilty of laches, which bars his right to have the writ issue. (People ex rel. Hallinan v. Klum, supra, and cases cited.) The judgment of the Circuit court of Cook county quashing the record of the Civil Service Commission is reversed and the writ of certiorari is quashed and the petition dismissed.

JUDGMENT REVERSED AND WRIT OF CERTIORARI QUASHED AND PETITION DISMISSED.

Sullivan, P. J., and Wright, J., concur.

34589

257

MERCHANTS AND MANUFACTURERS SECURITIES COMPANY, a corporation,
Appellant,

v.

JOHN DUFFY and MRS. JOHN DUFFY, also known as Margaret Duffy,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

261 I.A. 641

MR. JUSTICE HEBNER DELIVERED THE OPINION OF THE COURT.

On January 19, 1928, the plaintiff, Merchants and Manufacturing Securities Company, a corporation, obtained a judgment for $342.46 against the defendants, John Duffy and Mrs. John Duffy, upon a judgment note. On defendants' motion the judgment was opened and they were given leave to defend, the judgment to stand as security. The cause came on for hearing on April 23, 1930, and the defendants not appearing, the court adjudged that the judgment as confessed against the defendants on January 19, 1928, stand confirmed. On July 29, 1930, the defendants filed a petition requesting that the order of April 23, 1930, be vacated and set aside, and the court on July 30, 1930, vacated and set aside the order. The present appeal followed. The defendants have not here filed any brief.

From the petition filed by the defendants in support of their motion to vacate the order of April 23, 1930, it appears that on November 12, 1929, the plaintiff agreed to compromise its claim against the defendants; that they interviewed one Henry P. Krans who held a mortgage on their real estate, who promised them that when the loan matured he would increase same so as to enable them to pay the amount due plaintiff, and that defendants agreed to pay plaintiff

Mr. Justice Kerwin delivered the judgment of the Court.

On January 14, 1928, the plaintiff, Brotherhood and Amalgamated Transitic Company, a corporation, obtained a judgment for $[illegible] against the defendants, John Duffy and Mrs. John Duffy, upon a judgment note. On defendants' motion the judgment was opened and they were given leave to defend the judgment to stand as security. The matter came on for hearing on April 23, 1930, and the defendants not appearing, the court adjudged that the judgment be confirmed against the defendants on January 17, 1928, stand continued. On July 30, 1930, the defendants filed a petition requesting that the order of April 23, 1930, be vacated and set aside, and the court on July 30, 1930, vacated and set aside the order. The property appeal [illegible]. The defendants have not been filed any brief.

Upon the position taken by the defendants in support of their motion to vacate the order of April 23, 1930, it appears that on November 23, 1928, the plaintiff agreed to compromise its claim against the defendants for $[illegible] and Mary J. Kerwin also held a mortgage on their small estate, who promised them that when the loan matured he would increase some so as to enable them to pay the excess due plaintiff, but that defendants agreed to pay plaintiff

on October 16, 1930, and they stand ready and able to carry out their agreement, and that they had been informed by their attorney that this cause had been dismissed. Courts, in the interest of justice, exercise a liberal discretion in the matter of vacating a judgment entered by confession and allowing a defendant to defend, yet such discretion must be reasonable. The petition in the instant case did not set forth grounds which would be sufficient to vacate the judgment in a court of equity.

No legal grounds for vacating the judgment appearing from this record, the order of July 30, 1930, will, therefore, be reversed.

REVERSED.

of October 16, 1819, but that court struck out this notice to quiet and clear proceedings, on the ground that the bond intended by their statutory that this cause has been discontinued. Further, in the judgment of Justice, especially a judicial discretion in the matter of quieting a judgment because of conditions not affecting a defendant in actual, yet such discretion must be reasonable. The petition in the instant case did not state grounds which would be sufficient to warrant the judgment in a court of equity.

By legal grounds for vacating the judgment appearing from this record, the order of July 6, 1917, will, therefore, be reversed.

34661

THOMAS MAGNAMES,
Appellant,

v.

MORAN CONSTRUCTION COMPANY,
a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

261 I.A. 642

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover $4,000 for commissions claimed to be due him from defendant. At the close of the plaintiff's case, there was a directed verdict in favor of the defendant and judgment was entered on the verdict and plaintiff appealed.

The plaintiff filed a declaration consisting of the common counts and a special count in which he alleged that on February 4, 1927, he entered into an oral contract with defendant whereby it was agreed, that if plaintiff would procure for defendant a contract by which defendant would be employed to build a flat and store building in Chicago, defendant would pay plaintiff as compensation for his services in procuring said contract, the sum of $4,000; that on February 23, 1927, plaintiff did in fact procure for defendant said contract and thereby defendant became indebted to him for $4,000. Defendant pleaded non assumpsit and filed an affidavit of merits in which it claimed that plaintiff said he was in a position to procure a contract for defendant to erect a flat building and would do so, on the condition that defendant would pay plaintiff out of the net profits earned from said building contract such compensation as the defendant deemed reasonable and fair, but that if there were no profits earned, plaintiff would receive no compensation; that there were

Plaintiff brought an action of assumpsit against the defendant to recover $4,000 for commissions claimed to be due him from defendant. At the close of the plaintiff's case, there was a directed verdict in favor of the defendant and judgment was entered on the verdict and plaintiff appealed.

The plaintiff filed a declaration consisting of the common counts and a special count in which he alleged that on February 6, 1927, he entered into an oral contract with defendant whereby it was agreed, that if plaintiff would procure for defendant a contract by which defendant would be employed to build a flat and store building in Chicago, defendant would pay plaintiff as compensation for his services in procuring said contract, the sum of $4,000; that on February 23, 1927, plaintiff did in fact procure for defendant said contract and thereby defendant became indebted to him for $4,000. Defendant placed upon assumpsit and filed an affidavit of merits in which it claimed that plaintiff said he was in a position to procure a contract for defendant to erect a flat building and would do so, on the condition that defendant would pay plaintiff out of the net profits earned from said building contract such compensation as the defendant deemed reasonable and fair, but that if there were no profits earned, plaintiff would receive no compensation; that there was

no profits, and therefore defendant is not indebted to plaintiff.

The evidence discloses that plaintiff was in the business of building, selling and trading real estate; that defendant was engaged in the general contracting business; that early in January, 1927, Walter Moraw, secretary of the defendant, and plaintiff had a conversation in which Moraw employed plaintiff and agreed that if plaintiff would procure business for the defendant through his connections among builders and property owners, it would pay him a fair commission. In February, 1927, plaintiff brought in plans and specifications for a building which one John Vasilopoulos proposed to erect in Chicago. The job was estimated and a price agreed upon. Moraw agreed with plaintiff that if plaintiff could procure for defendant a contract with Vasilopoulos for the erection of the proposed building, defendant would pay plaintiff as a commission $4,000 when the job was completed. As a result of the efforts of plaintiff the contract was procured. The evidence further shows, that plaintiff had been acquainted with Vasilopoulos before he was employed by defendant, and that Vasilopoulos knew that plaintiff was employed by defendant. It also shows that Vasilopoulos did not know the amount of commissions plaintiff was to receive from defendant. The contract price for the building was $52,000; of this $3,000 was to liquidate existing encumbrances; the balance of $49,000 was arrived at by defendant adding to the estimated cost of the building, the commission of $4,000 to be paid to plaintiff. A written contract was entered into between defendant and Vasilopoulos, and the building was in fact completed by defendant under the contract procured by plaintiff.

At the close of plaintiff's case, the trial court directed the jury to find the issues for the defendant, and expressed the opinion that plaintiff and defendant had entered into an agreement to defraud Vasilopoulos out of $4,000, and therefore plaintiff was not

no profits, and therefore defendant is not liable to plaintiff.

The evidence discloses that plaintiff was in the business of building, selling and leasing real property when defendant was engaged in the general contracting business; then early in January, 1957, Walter Berns, secretary of the corporation, and plaintiff had a conversation in which Berns convinced plaintiff and agreed that if plaintiff would procure business for the defendant through his connections among builders and property owners, it would pay him a full commission. In February, 1957, plaintiff brought in plans and specifications for a building which was from Washington presented to Berns in Detroit. The job was obtained and a price agreed upon. Berns agreed with plaintiff that if plaintiff would procure for defendant a contract with Washington for the erection of the proposed building, defendant would pay plaintiff as a commission $5,000 when the job was completed, in a result of the efforts of plaintiff the contract was procured. The evidence further shows, that plaintiff had been acquainted with Washington before he was employed by defendant, and that Washington knew PLAINTIFF was employed by defendant. It also shows that Washington did not know the amount of commission plaintiff was to receive from defendant. The contract price for the building was $82,000; of this $5,000 was to liquidate existing encumbrances; the balance of $40,000 was advanced as by defendant during the erection of the building. The commission of $5,000 to be paid to plaintiff. A mortgage contract was entered into between defendant and Washington, and the building was in fact completed by defendant while the contract procured by plaintiff.

At the close of plaintiff's case, the trial court directed the jury to find the issues for the defendant, and expressed the opinion that plaintiff and defendant had entered into an agreement to defraud Washington out of $4,000, and therefore plaintiff was not

entitled under the law to any compensation.

It is conceded that if the contract was to defraud Vasilopoulos out of $4,000, no action could be maintained thereon, but it is contended that there is no evidence of fraud. John Vasilopoulos was of full age; he was mentally competent and experienced in business and knew the plaintiff was employed by the defendant and, so far as the evidence in this case shows, he willingly and without any misrepresentation of any kind on the part of plaintiff, entered into a written contract by which the defendant was to erect a building for $52,000. A contract for an agreed compensation or commission upon business brought to a firm is not illegal. (Vocke v. Peters, 58 Ill. App. 338; Burnett v. Potts, 236 Ill. 499, and Lamb v. Tomlinson, 261 id. 388.) If plaintiff was guilty of fraud the facts should be presented to a jury for them to pass on.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

entitled under the law to any compensation.

It is conceded that if the contract was to deliver Washington and of $4,000, no action could be maintained thereon, but it is maintained that there is no evidence of fraud. John Washington was of full age; he was mentally competent and experienced in business and knew the plaintiff's was employed by the defendants and, so far as the evidence in this case shows, he willingly and without any misrepresentation of any kind on the part of plaintiff, entered into a written contract to which the defendant was to erect a building for $4,000. A contract for an agreed compensation or remuneration upon business grounds to a firm is not illegal. (Yanke v. Hughes, 32 III. App. 238; Gammell v. Tuttle, 102 III. 490, and Lamb v. Tomlinson, 201 id. 388.) If plaintiff was guilty of fraud the trial judge should be justified in a jury for fraud is just as the

The judgment of the circuit court of Cook County is affirmed and the cause remanded.

AFFIRMED.

HANAHAN, P. J., DON FRANCHY, J., concur.

34610

EDWARD T. SPEAKMAN,
Appellee,

v.

BILLWYN M. BELL,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

261 I.A. 642

MR. JUSTICE MARSAN DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit brought by plaintiff Edward T. Speakman against Billwyn M. Bell for money loaned, heard by a jury, a verdict for plaintiff for $2661.15, and judgment on the verdict from which defendant appealed.

Plaintiff's declaration consisted of five counts, alleging that the plaintiff loaned defendant on June 1, 1923, $2500, which defendant agreed to repay within three months, with interest at six per cent. The third count in addition states that subsequent to making the loan, defendant handed plaintiff a promissory note, signed by defendant as president of Pressed Steel Equipment Company, due three months after June 1, 1923, but that thereafter on May 14, 1928, denied that the loan was other than a personal loan to defendant. The defendant pleaded non assumpsit and the statute of frauds to the third count.

The plaintiff's evidence discloses that on June 1, 1923, he drew his check for $2500 payable to the defendant, which he claims he loaned to the defendant, the defendant stating he desired the loan with which to pay his household expenses, the loan to be repaid in ninety days; that check was indorsed by defendant to the Pressed Steel Equipment Company and by that company deposited in the Central Trust Company, with whom it banked; that the defendant

Syllabus

Justice T. [illegible] delivered the opinion of the court.

No. 5,[illegible] [illegible] Appellant, v. [illegible] Company. [illegible] Appeal from the Supreme Court of the State of [illegible].

This was an action in assumpsit brought by plaintiff Harold T. [illegible] against Clifton W. Hall for money loaned, in the sum of $ [illegible], a variance for plaintiff for $[illegible], was judgment in the trial in which [illegible] appealed.

Plaintiff's declaration consisted of five counts, stating that the plaintiff loaned defendant on June 1, 1923, [illegible], which defendant agreed to repay [illegible] three months, with interest at six per cent. The third count in addition states that subsequent to making the loan, defendant handed plaintiff a promissory note, signed by defendant as president of Pressed Steel Equipment Company, due three months after June 1, 1923, but that thereafter on July 14, 1923, denied that the loan was either than a personal loan to defendant. The defendant pleaded non assumpsit and the statute of frauds to the third count.

The plaintiff's evidence discloses that on June 1, 1923, he drew his check for $2500 payable to the defendant, which he claims he loaned to the defendant, the defendant stating he needed the loan with which to pay his household expenses, the loan to be repaid in ninety days; that check was indorsed by defendant to the Pressed Steel Equipment Company and by that company deposited in the Central Trust Company, with whom it banked; that the defendant

gave plaintiff a note for $2500, payable to plaintiff, signed "Pressed Steel Equipment Co. By D. M. Bell, Pres."; that plaintiff did not know it was a note until he arrived at his home, but did nothing about it; that on June 11, 1924, defendant delivered to plaintiff a check of the Pressed Steel Equipment Company, payable to plaintiff, for $650 to apply on account of said loan and that no other payment was ever made on the loan; that plaintiff never loaned any other money to the Pressed Steel Equipment Company, but had on one occasion, about a year or two before June 1, 1923, discounted a note for $2900; that in 1920, he purchased $1000 worth of stock of the company and a year later $500 additional. The defendant is the president of the Pressed Steel Equipment Company and plaintiff is a stockholder. Defendant's personal bills were at times paid by checks of the Pressed Steel Equipment Company. Defendant's version is that he advised plaintiff the company was in need of capital and that he requested a loan of plaintiff for the company, and that it (the company), gave plaintiff its note to cover the loan; that he personally never borrowed the $2500, and that the repayment of $650 was made by the company. A. Mitchell testified for the defendant that he was a stockholder of the Pressed Steel Equip ment Company and that he had a conversation with plaintiff in which plaintiff said he had helped the company occasionally, but was not sure as to what form his transaction took.

The defendant contends that the question for determination was, to whom was the loan made, and there being merely the testimony of the plaintiff and the denial of the defendant, the plaintiff cannot recover. In the case of Mills & Co. v. Duke, 232 Ill. App. 277, 280, the court said:

"Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness who, from the reading of the printed page of the record, appears

gave plaintiff a note for $5000, payable to plaintiff, signed "Pressed Steel Equipment Co. By T. E. Doe, Pres." Doe testified he did not know it was a note until he received its his home, but did admit upon his direct on June 12, 1924, defendant delivered to plaintiff a check of the Pressed Steel Equipment Company, payable to plaintiff, for $500 in supply on account of note loan and that no other payment was ever made on the loan; that plaintiff never loaned any other money to the Pressed Steel Equipment Company, but had on one occasion, about a year or two before June 4, 1924, discounted a note for $1500; that in 1924, in payment [illegible] earlier of which the company and a year later $500 additional. The defendant in the proceedings of the Pressed Steel Equipment Company and plaintiff is a stockholder. Defendant's personal bills were at times paid by checks of the Pressed Steel Equipment Company. Defendant's version is that he advised plaintiff the company was in need of capital and that he requested a loan of plaintiff for the company, and that it (the company), gave plaintiff its note to cover the loan; that he personally never borrowed the $5000, and that the repayment of $500 was made by the company. A. Estabrik testifies for the defendant that he was a stockholder of the Pressed Steel Equipment Company and that he had a conversation with plaintiff in which plaintiff said he had loaned the company occasionally, but was not sure as to what form his transaction took.

The defendant contends that the question for determination was, to whom was the loan made, and above being merely the testimony of the plaintiff and the denial of the defendant, the plaintiff cannot recover. In the case of Ellis & Co. v. Duke, 223 Ill. App. 577, 580, the court said:

"Where the contradiction going to the case is supported by the testimony of one witness and contradicted by another witness, from the evening of the plaintiff back of the trouble, absent

to be equally credible, a court of review is not warranted in disturbing the verdict of the jury, because under the law this court cannot disturb the verdict of a jury unless it is clearly against the manifest weight of the evidence. The question of the preponderance of the evidence does not arise at all in this court. There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review."

See also Nimer v. Miller, 255 Ill. App. 465, and cases cited. After examining the testimony in this cause, we would not be warranted in holding that the verdict is against the manifest weight of the evidence.

It is assigned as error by the defendant, that the court admitted improper evidence and excluded proper evidence. In counsel's brief, he states "there are numerous such admissions," and he complains that plaintiff was permitted to state the purpose of the $650 payment which was made at the Graceland Cemetery. It is not denied that this payment was made on the loan, but because the plaintiff spoke of his daughter's death, defendant claims he was prejudiced. We have examined the record and find that the testimony with reference to the circumstances of this payment was not objected to until plaintiff's counsel offered the check payable to the cemetery, and this condition of the record does not justify reversal. There was no error in admitting a letter from plaintiff to defendant in which plaintiff stated that since he saw defendant at the Club, when defendant stated he would repay the loan plaintiff made defendant on June 1, 1923, he (plaintiff) was reminding defendant of his promise, and defendant's reply in which defendant stated, that he had refrained from answering plaintiff's letter because he did not know what he was going to be able to do about the business or anything else, and that he would be able to tell plaintiff definitely, by the 18th or 20th of the month. Over defendant's objection, plaintiff testified that three weeks before the case was tried, defendant asked him to have the case continued for about two weeks and by that time he might have some money to take care

to be equally credible, a jury of peers is not convinced in
evaluating the worthy of the party, because above the law this
court cannot dismiss the verdict of a jury whose is to be directly
against the modified weight of the evidence. The question of
the credibility of the witnesses does not arise as yet in this
case. There the only things which a jury evaluates on the issue
is such as is not in the record. Thus on a jury evaluates on the issue
of the credibility of the witnesses, their manner of testifying
and a great many other circumstances. That can be a much better
position to make such an evaluation the issue of the matter is con-
cerning than a panel of judges.

See also Tinker v. Bailey, 320 Ill. App. 424, and cases cited. After
examining the testimony in this cause, we could not be warranted in
holding that the verdict is against the manifest weight of the evidence.

It is unknown to me by the evidence, that the court
admitted improper evidence and excluded proper evidence. In counsel's
brief, he states "There are numerous such statements," and he cite-
plaints that plaintiff was prejudiced in such the judge
present which was made on the bench, but because the plaintiff
upon of his daughter's death, defendant claims he was prejudiced.
We have examined the record and find that the testimony with reference
to the circumstances of this payment was not objected to until plain-
tiff's counsel offered the check payable to the cemetery, and this
condition of the record does not justify reversal. There was no
error in admitting a letter from plaintiff to defendant in which
plaintiff stated that alone he was defendant at the time, when defend-
ant asked he would repay the loan plaintiff made defendant on June 1,
1948, he (plaintiff) was remaining defendant of his promise, and defend-
ant's reply in which defendant stated, that he had returned from
converting plaintiff's letter because he did not know what he was going
to be able to do about the business or anything else, and that he would
be able to tell plaintiff definitely, by the 15th or 20th of the month.
Two defendant's witnesses, plaintiff testified that these letters
the case was tried, defendant asked him to have the case continued for
about two weeks and by that time he might have some money to take care

of the obligation. Admissions or statements of fact are evidence. (Hook v. Bunch, 180 Ill. App. 39.) We have considered the remaining objections of the defendant to the admissions of what he claims improper evidence and the exclusion of proper evidence and find no error therein.

A further contention is made that the court erred in refusing an instruction tendered by defendant which told the jury to disregard the testimony of the plaintiff with reference to the conversation in which defendant was supposed to have said, that if the case was continued defendant would have money to take care of the obligation. In view of what we have said above, there was no error in refusing this instruction.

We think none of the errors assigned calls for a reversal of the judgment and accordingly it is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

of the allegations. Statements or statements of fact are very rare. (Pack v. Beyer, 157 F.2d 884 (2d Cir. 1946)) The more remarkably the remaining objections of substantiation in the statements of which he claims improper evidence and the violation of property rights and that he cannot consent.

A further consideration is made that the court erred in refusing an instruction asserted by plaintiff which said the jury is disregard the availability of the plaintiff's witnesses in the same verification in which defendant was acquitted in both cases, but if the case was qualified defendant would have means to take care of the difficulties. In view of that the jury will where, there was no error in excluding this instruction.

We raise none of the other contentions which that a reversal of the judgment and consequently it is affirmed.

AFFIRMED.

Tuttle, C.J., and Rivise, J., concur.

34661

LING BROS. Inc.,
Appellee,

v.

P. J. CORRIGAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

261 I.A. 642

MR. JUSTICE KRCMER DELIVERED THE OPINION OF THE COURT.

April 18, 1930, plaintiff obtained judgment against defendant for $490.50, being rent commencing January 15, and ending April 14, 1930, at the rate of $140 a month, plus attorneys' fees, by confession, on a cognovit in a lease. Subsequently defendant moved that the judgment be vacated and filed an affidavit in support of his motion. This was denied and from the order denying the motion defendant appealed.

The lease is in writing and under seal, for an apartment at 2730 Pine Grove avenue, Chicago, and demises the premises for a private residence or dwelling for one year commencing January 15, 1930, the defendant agreeing to pay $140 a month, the lease providing inter alia that the "lessee has examined said premises prior to and as a condition precedent to his acceptance and the execution hereof and is satisfied with the physical condition thereof, * * and agrees and admits that no representations as to the condition * * has been made by the lessor or his agent, which is not herein expressed; * * and likewise agrees and admits that no agreement or promise to decorate, alter, repair or improve said premises, either before or after the execution hereof, not contained herein, has been made by the lessor or his agent." By the affidavit filed by defendant in support of his motion to vacate the

April 18, 1930, plaintiff obtained judgment against defendant for $[illegible], being real consideration January 13, and ending April 13, 1930, at the rate of $[illegible] a month, plus attorneys' fees, by confession, on a cognovit in a loan. Subsequently interested moved that the judgment be vacated and filed an affidavit in support of his motion. This was denied and from the order denying the motion defendant appealed.

The issue is in writing and under seal, for an apartment at 2720 Pine Grove avenue, Chicago, and denises the premises for a private residence or dwelling for one year commencing January 13, 1930, the defendant agreeing to pay $[illegible] a month. The lease providing inter alia that the "lessee has examined said premises prior to and as a condition precedent to his acceptance and the execution hereof and is satisfied with the physical condition thereof," " and agrees and admits that no representations as to the condition " " has been made by the lessor or his agent, which is not herein expressed; " " and likewise agrees and admits that no agreement or promise to decorate, alter, repair or improve said premises, either before or after the execution hereof, not contained herein, has been made by the lessor or his agent." By the affidavit filed by defendant in support of his motion to vacate the

judgment the defendant asserted that the lease is only a part of the contract between defendant and the reputed owner of the building, Mrs. [illegible]. [illegible]. Clutter; as a part of said entire contract the said owner agreed and promised to furnish completely the said apartment for occupancy by defendant as a condition precedent to defendant even considering leasing the premises; said pretended lease and agreement to furnish said apartment were one indivisible contract, each essential to the validity of the other, and the total rental agreed upon was $175 a month, allocated $140 a month as rental for the premises and $35 a month as rental for the furniture; that said alleged lease was intended to be and is a fraud upon defendant; that the owner neglected, delayed and refused to install any furniture in said apartment as she had agreed to do and never furnished the apartment in accordance with her agreement; that by reason of lessor's failure to furnish said apartment as agreed, defendant was unable to occupy said apartment and never occupied the same; that no rental whatever accrued under said lease because the said lease and the said contract for furniture, which was a part thereof, were never carried out by the owner, and therefore the consideration for said lease entirely failed.

The defendant claimed that the lease attached to plaintiff's statement of claim is "only a part" of the contract and that the omitted portions may be established by parol testimony; that if the judgment in the instant case be set aside and vacated he would prove the facts above stated in his affidavit. The lease in the instant case is under seal and purports to embody the entire agreement of the parties, while the parol agreement which the defendant sets up in his affidavit is inconsistent with the express terms of the lease. The lease is plain and unambiguous and covers the rental of an unfurnished apartment. The statement in the

judgment the defendant answers that the lease is only a part of the contract between defendant and the corporated owner of the building, Mrs. M. Claudert; as a part of said entire contract the said owner agreed and promised to furnish completely the said apartment for occupancy by defendant as a condition precedent to defendant ever commencing living in the premises; said promised lease and agreement to furnish said apartment were the indivisible contract, such essential to the validity of the other, and the total rental agreed upon was $175 a month, allocated $140 a month as rental for the premises and $35 a month as rental for the furniture; that said alleged lease was intended to be and is a fraud upon defendant; that the owner negotiated, delayed and refused to install any furniture in said apartment as she had agreed to do and never furnished the apartment in accordance with her agreement; that by reason of lessor's failure to furnish said apartment as agreed, defendant was unable to occupy said apartment and never occupied the same; that on April, nineteen hundred and twenty-four lessor demanded the said rent for furniture, which was a part thereof, and was never carried out by the owner, and therefore the consideration for said lease entirely failed.

The defendant claimed that the lease attached to plaintiff's statement of claim is "only a part" of the contract and that the omitted portions may be established by parol testimony; that if the judgment in the instant case be set aside and remanded he would prove the facts above stated in his affidavit. The lease in the instant case is under seal and purports to embody the entire agreement of the parties, while the parol agreement which the defendant sets up in his affidavit is inconsistent with the express terms of the lease. The lease is plain and unambiguous and covers the rental of an unfurnished apartment. The statement in the

affidavit that the entering into of the lease was upon the express agreement that lessor would furnish completely the apartment for occupancy, involves an enlargement of the terms of the written contract. Parol evidence cannot be introduced to vary or contradict the express terms of a written contract, complete and certain in all its terms and purporting to embody the entire agreement between the parties. In the case of Ross v. Griebel, 136 Ill. App. 399, the court said:

"All contracts in some sense are verbal contracts before being reduced to writing. Their terms and conditions must be talked over and agreed to, but when parties have reached an understanding and embodied their agreement in an instrument under seal, that instrument must be, not only the sole evidence of their contract, but in the absence of fraud or mistake, no parol agreement antecedent to, contemporaneous with or subsequent to its making can be used to vary, extend or modify any of the essential features or extend the liability of any of the parties thereto. 'When a contract is reduced to writing, all matters of negotiation and discussion on the subject, antecedent to and dehors the writing are excluded, as being merged in the instrument, unless offered to overthrow the contract as being fraudulent or illegal.' 2 Kent's Com., 556. 'No verbal explanations or stipulations will be permitted to vary an agreement in writing; and negotiations between parties, prior to or contemporaneous with the execution of an instrument, are merged in it, and cannot be reconsidered. Thus extrinsic evidence is generally inadmissible to show that the lessor at the time of executing a written lease, promised to repair or to supply deficiencies in the furniture of the leased premises.' Taylor on Landlord and Tenant, section 44. It is well settled, 'that a written contract, unambiguous in its terms, cannot be varied, contradicted or modified by parol evidence of anything that occurred at or prior to the time when such written contract was executed.' 11 Am. and Eng. Ency. of Law, 2nd ed., page 548. In Telluride Power Co. v. Crane Co., 208 Ill. 218, the Supreme Court said: 'The rule is that when the writings show, upon inspection, a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings.' 'A written contract, if unambiguous in its terms, cannot be varied, contradicted or modified by parol evidence of conversations relating to the subject matter of the contract, which occurred between the contracting parties before the execution of the contract. (Town of Kane v. Farrelly, 192 Ill. 521.) Nor can a sealed executory contract be altered, changed or modified by parol agreement. (Alschuler v. Schiff, 164 Ill. 298.)' Schneider v. Sulzer, 212 Ill. 92."

See also Friedman v. Schwabacker and Schwabacher, 64 Ill. App. 422; Stafford and Stamm v. Ward, 204 Ill. App. 532; Lord v.

effively that the entering into of the lease was upon the express agreement that Trustees would indefinitely the appropriate for occupancy, involves an enlargement of the terms of the written contract. Parol evidence cannot be introduced to vary or contradict the express terms of a written contract, explicit and certain in all its terms and purporting to embody the entire agreement between the parties. In the case of Cone v. Fridgal, 132 III. App. 399, the court said:

"All contracts in some form or verbal constitute unless being reduced to writing. Their terms and conditions must be taken over and agreed to, but when parties have reduced an understanding and embodied their agreement in an instrument which is, and purports to be, but only the sole evidence of their contract, but in the absence of fraud or mistake, no parol agreement antecedent to, contemporaneous with or subsequent to the making of the instrument, where offered to contradict, vary, add to or modify any of the essential features or enlarge the liability of one of the parties thereto. 'Then a contract is reduced to writing, all matters of negotiation and discussion on the subject, understood to be merged in the writing and embodied, or being merged in the instrument, unless offered to contradict the construction of the instrument or illegal.' Id. 132 Ill. 399. 'No verbal explanations or stipulations will be permitted to vary or add to agreement in writing; and negotiations between parties, prior to or contemporaneous with the execution of an instrument, are merged in it, and cannot be resorted to. Then additional evidence is generally inadmissible to show that the lease is the sum of a written lease, premises to repair or to apply deficiencies in the insurance of the lease provisions.' Taylor on Landlord and Tenant, section 64. It is well settled, 'Ill a written instrument, unambiguous in its terms, cannot be varied, contradicted or modified by parol evidence of anything that occurred or prior to the time when such written contract was executed.' Id. Id. Ibid. of Law, and ed., page 242. In Fellowship Fund v. Fund, 208 Ill. 112, the supreme court said: 'The rule is that when the writing does, upon interpretation, a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writing.' 'A written contract, if unambiguous in its terms, cannot be varied, contradicted or modified by parol evidence of conversations existing in the subject matter of the contract, which occurred at the time of the execution of the contract. (Tyne of Ohio v. Thirsity, 102 Ill. 221.) Nor can a valid accessory contract be altered, changed or modified by parol agreement. (Lindquist v. Schiff, 164 Ill. 193.)' Lumsden v. Myers, 214 Ill. 24."

See also Friedman v. Gunsburger and Schumacher, 84 Ill. App. 422; Shelford and Shaw v. Ward, 204 Ill. App. 528; Ford v.

Haufe, 77 Ill. App. 91; Lloyd v. Sandusky, 203 Ill. 621; Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88; Seitz v. Brewer Refrigerating Co., 141 U. S. 510,

The defendant contends that there was a misdescription of the parties to the lease, in that the action was brought in the name of Lino Bros. Inc., and not in the name of Lino Bros. Inc., Agts, as lessors named in the body of the lease. We are of the opinion, the defendant having signed the lease is bound by it. (Montanye v. Callahan, 84 Ill. 355.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

Davis, 77 Cal. App. 2d, *Ziegler v. Superior Ct.*, 84 Cal. App. 2d, *Tanner & Lane Bldg. Co. v. Eliminator & Co.*, 44 Cal. App. *Cain v. Superior Entertainment Co.*, 142 P. 2d.

The defendant contends that there was a misdescription of the parties to the lease, in that the action was brought in the name of Lino Bros. Inc., and not in the name of Lino Bros. Inc., dba, as lessors named in the body of the lease. We are of the opinion, in reviewing having signed the lease in words as is. [*Lawrence v. Delphine*, 84 Cal. App.]

The judgment of the municipal court is affirmed.

LEVINSON.

Gardner, P. J., and Stanley, J., concur.

34679

MARY LASKOWSKI,
(Cross defendant),
Appellant,

v.

JOSEF LASKOWSKI,
(Cross complainant),
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

261 I.A. 642

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

On January 31, 1928, Mary Laskowski filed a bill for divorce charging Josef Laskowski with cruelty. He answered, denying the charge, and on October 4, 1928, filed a cross-bill in which he charged that Mary Laskowski committed adultery on November 15, 1927, with John Doe, whose true name is unknown. On June 18, 1929, Mary Laskowski dismissed her bill. After hearing the evidence on the cross-bill, the court entered a decree finding Mary Laskowski guilty of adultery with John Doe on November 15, 1927, and granted the cross-complainant a divorce. From that decree cross-defendant appealed.

The parties were married October 19, 1927, and separated December 1, 1927. Both of the parties had been married before, each having children by the prior marriage. There were no children born of this marriage. Upon the hearing on the cross-bill and answer an attempt was made to prove Mrs. Laskowski guilty of adultery with a person whose name was unknown. There was no direct evidence as to any act. The record fails to show sufficient proof that Mrs. Laskowski was guilty of adultery with John Doe as found by the chancellor. The only testimony tending to support the charge is given by the daughter of Josef Laskowski and her friend, both of the girls being about eighteen years old; they testified that on November 15, 1927, about seven o'clock in the evening, they saw Mary Laskowski

MAX LANDOWSKI.
(Cross defendant),
Appellant,

v.

MARY LANDOWSKI,
(Cross complainant),
Appellee.

Appeal from Superior Court of Cook County.

Mr. Justice Burke delivered the opinion of the court.

On January 21, 1926, Mary Landowski filed a bill for divorce against Max Landowski with custody. He answered, denying the charge, and on October 6, 1926, filed a cross-bill in which he charged that Mary Landowski committed adultery on November 12, 1927, with John Doe, whose true name is unknown. On June 12, 1928, Mary Landowski dismissed her bill. After hearing the evidence on the cross-bill, the court entered a decree finding Mary Landowski guilty of adultery with John Doe on November 12, 1927, and granted the cross-complainant a divorce. From that decree appellant appeals.

The parties were married October 12, 1927, and separated December 1, 1927. Both of the parties had been married before, each having obtained by the prior marriage. There were no children born of this marriage. Upon the hearing on the cross-bill and answer an attempt was made to prove Mrs. Landowski guilty of adultery with a person whose name was unknown. There was no direct evidence as to her. The record fails to show not; ioiant proof that Mrs. Landowski was guilty of adultery with John Doe as found by the chancellor. The only testimony tending to support the charge is given by the daughter of Josef Lauczynski and her friend, both of the girls being about eighteen years old; they testified that on November 12, 1927, about seven o'clock in the evening, they saw Mary Landowski

walk into the boarder's bedroom, closing the door, where she remained half an hour, and when she came out her hair was mussed and her face flushed, and she walked to the bathroom; that the boarder afterwards came out of the bedroom and he, too, walked into the bathroom; he had his trousers on but no shirt; that Mary Laskowski before she entered the bedroom knew the witnesses were in the parlor right off the bedroom, and that during the time they were in the bedroom they heard no talking, it was quiet. It further appears from the evidence that this boarder, whose name is not known to any of the witnesses, lived in the flat occupied by the parties some nine days to three weeks, cross-complainant's daughter testifying that he was there three weeks and was brought in by MaryLaskowski, while Mary Laskowski says he was there but nine days and was brought to the flat by cross-complainant's daughter, after November 15, possibly about November 23. It further appears that the daughter told her father on November 17, the story as related by her on the witness stand; cross-complainant did not, however, accuse his wife of being unfaithful at the time she left December 1, 1927. At the date of the hearing Mary Laskowski was 46 years of age, had been married to her first husband twenty-two years and was the mother of seven children. She denied the charge against her. Since separating from her husband she has been living within a short distance of him, he residing at 2405 and she at 2449 South California avenue, Chicago. There was no evidence that the boarder has ever been seen in her company or at her home after she left defendant's home.

The charge of adultery may be established by showing circumstances which raise the presumption of cohabitation and unlawful intimacy (Carter v. Carter, 158 Ill. 434; Zimmerman v. Zimmerman, 242 id. 552; Jones v. Jones, 114 Ill. App. 201), and the charge need be proven only by a preponderance of the evidence. (Stiles v. Stiles, 167 Ill. 576; Lenning v. Lenning, 176 id. 180.)

walk into the bartender's bedroom, closing the door, where she remained half an hour, and when she came out her hair was mussed and her face flushed, and she walked to the bedroom; that the bartender afterwards came out of the bedroom and he, too, walked into the bedroom; he had his trousers on but no shirt; that Mary Jankowski before she entered the bedroom had the witnesses wait in the parlor right off the bedroom, and that during the time they were in the bedroom they heard no fighting, it was quiet. It further appears from the evidence that this bandit, whoever came in that house to rob of the witnesses, lived in the flat occupied by the policeman and also close to other cops, cross-complainant's counsel frankly that he was there where and his brought in by Jankowski, while Mary Jankowski says he was there but when drys and was brought in the flat by cross-complainant's daughter, after December 17, probably about November 23. It highly improbable that the bandit was not taken on December 17, the story as related by her on the witness stand; cross-complainant did not, however, assume his wife of being unfaithful at the time she left December 1, 1937. At the date of the hearing Mary Jankowski was 46 years of age, had been married to her first husband twenty-two years and was the mother of seven children. She denied the charge against her. Since separating from her husband she has been living within a short distance of him. At residing at 4800 and she at 4840 North Kenmore avenue. Counsel. There is no evidence that the husband has ever been seen in her company or at her home after she left defendant's home.

The charge of adultery may be established by showing circumstances which raise the presumption of cohabitation and unlawful intimacy (Burke v. Burke 280 Ill. 124; Zimmerman v. Zimmerman, 220 Ill. 280; Jones v. Jones 124 Ill. App. 202), and the charge need be proven only by a preponderance of the evidence. (Phillips v. Phillips, 247 Ill. 472; Jones v. Jones, 171 Ill. App. 247).

The accused party is presumed to be innocent of the charge of adultery and this presumption of innocence continues until convincing proof sufficient to overcome it is presented. (Ovenu v. Ovenu, 201 Ill. App. 607; Carter v. Carter, 62 Ill. 439; Blake v. Blake, 70 id. 618; Moef v. Moef, 323 id. 170.) In Whitlock v. Whitlock, 268 Ill. 418, referring to a charge of adultery, the court said:

> "When such a charge is made it involves the character of both parties to the offense, and the character of the woman, to whom it is of priceless value. She should not be found guilty on evidence which may as well import innocence as guilt."

We are mindful of the rule that a court of review will not disturb the findings of the chancellor unless such findings are clearly against the weight of the evidence. Still, the instant decree rests upon merely circumstantial evidence. Mary Laskowski's denial, with the other circumstances in the case, in our opinion, present a sufficient defense to the charge made by the cross-bill. For the reasons indicated, the decree is reversed and the cause is remanded with directions to dismiss the cross-bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Gridley, J., concur.

The warranty policy is premised on an insurance of the change of mortality and this presumption of insurance continues until cancelling proof satisfactory to overcome it is presented. (Grange v. Crawford, 201 Ill. App. 417; Butler v. Gunter, 24 Ill. 489; Blake v. Blake, 70 Ia. 649; Hurd v. Hurd, 200 Ia. 1001.) In Whitlock v. Whitlock, 222 Ill. 118, relying on a change of mortality, the court said:

"When such a change is made it involves the assumption of both parties to the policy, and the character of the evidence, on which it is of paramount value. It should not be found guilty on evidence which may be well imported insurance in policy."

To our minds of the truth that a court of review will not disturb the findings of the chancellor unless such findings are clearly against the weight of the evidence. Still, the instant case works upon mortality statistical evidence. Dorr Insurance's denial, with the other circumstances in the case, in our opinion, presents a sufficient defense to the change made by the cross-bill. For the reasons indicated, the decree is reversed and the cause is remanded with directions to dismiss the cross-bill for want of equity.

Reversed and remanded with directions.

Jackson, P. J., and Shepherd, J., concur.

34691

ELSIE L. NYSTROM,
(cross-defendant),
Appellant,

v.

ALBERT H. NYSTROM,
(cross-complainant),
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

261 I.A. 642

MR. JUSTICE KNUNE DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill for separate maintenance, alleging that on June 29, 1924, the defendant, without any cause or provocation on her part, left her and has since refused to live and reside with her or provide her a home and that she is living separate and apart from the defendant. The defendant answered, denying the charge and filed his cross-bill, in which he alleged that his wife was guilty of wilful desertion, without any reasonable cause, for the space of more than two years; the wife denied this charge, replications were filed to the answers. A trial was had resulting in favor of the defendant, and the court dismissed the original bill and under the cross-bill granted the husband a divorce on the ground of desertion. Complainant has appealed to this court and asks a reversal upon the ground that her bill is supported by the greater weight of the evidence, and that the decree is against the clear preponderance of the evidence.

From the record in the instant case it appears that the parties were married on January 29, 1923, and lived together up to the month of June, 1924. It was complainant's third marriage and defendant's first marriage. Immediately after their marriage defendant expended $1200 in the purchase of furniture, and with some furniture that the wife had the parties furnished an apartment where

34603

ELLEN E. STEVENS,
(cross-defendant),
Appellee,

vs.

ADAMS E. STEVENS,
(cross-complainant),
Appellant.

APPEAL FROM CHAUTAUQUE
COUNTY, OHIO COURT.

2CI I.A. 642

MR. JUSTICE KEMPER DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill for separate maintenance, alleging that on June 14, 1911, the defendant, without any cause or provocation on her part, left her and has since refused to live and reside with her or provide for a home and that she is living separate and apart from the defendant. The defendant answered, denying the charge and filed his cross-bill, in which he alleged that his wife was guilty of willful desertion, without any reasonable cause, for the space of more than two years; the wife denied this charge, replications were filed to the answers. A trial was had resulting in favor of the defendant, and the court dismissed the original bill and granted the cross-bill granted the husband a divorce on the ground of desertion. Complainant has appealed to this court and asks a reversal upon the ground that her bill is supported by the greater weight of the evidence, and that the decree is against the clear preponderance of the evidence.

From the record in the instant case it appears that the parties were married on January 29, 1911, and lived together up to the month of June, 1914. It was complainant's third marriage and defendant's first marriage. Immediately after their marriage defendant acquired [illegible] in the business of insurance, and with some furniture that the wife had the parties furnished an apartment where

they resided for about one year. Defendant was employed as a carpenter, earning $60 a week. During the time they occupied the apartment there were no difficulties or differences between the parties. After the expiration of one year they vacated the apartment, stored the furniture in the name of the wife and moved to a room in a hotel, living thus for about two months. The room in the hotel having no bath or facilities for cooking or housekeeping the parties ate their meals in a restaurant. There is no complaint by the wife of any mistreatment or neglect by the husband while they lived in the hotel room. It is claimed by defendant that his wife became tired of housekeeping and performing her household duties and that he consented to move into the hotel room to avoid any differences or quarrels with his wife; that after two months because of the character of his employment and the lack of home facilities and comforts he told his wife to rent a flat and place the furniture in it, which she refused to do and told him that she was going to stay in the hotel, that he could do as he pleased. Defendant left the hotel but continued to support his wife at the hotel for two months. Complainant testified that when her husband left her he gave as his reason, "he didn't want to support her, that he wanted to live independent," and that after he left her she telephoned him at his mother's home and asked him to come back and live with her, which he refused to do, all of which is denied by the husband. On the other hand, the defendant testified that his wife told him, "she was tired of keeping house; that she would put the furniture in storage and move in a hotel, to which he objected, saying that it was no place for him as he was a working man, working at the steel mills, would come home black and would be ashamed to go into the hotel, but that he consented to the arrangement and later told her

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employer, earning 100 a week. During the time they occupied
the apartment there were no dirt facilities or differences between
the parties. After the expiration of one year each vacated the
apartment, stored the furniture in the name of the wife and moved to
a room in a hotel, living there for about two months. The room in
the hotel having no bath or facilities for cooking or housekeeping
the parties ate their meals in a restaurant. There is no complaint
by the wife of any mistreatment or neglect by the husband while they
lived in the hotel room. It is claimed by defendant that his wife
became tired of housekeeping and preferring her household duties
and that he consented to move into the hotel room to avoid any
difficulties or quarrels with his wife; that after the marriage
of the daughter of his employer and the lease of home facilities,
and afterwards he told his wife he came a flat and place the furniture
in it, which she refused to do and told him that she was going to
stay in the hotel. That he could do as he pleased. Defendant left
the hotel but continued to support his wife at the hotel for two
months. Complainant testified that when her husband left her he
gave as his reason, "he didn't want to support her, that he wanted
to live independent," and that after he left her she telephoned him
at his mother's home and asked him to come back and live with her,
which he refused to do, all of which is denied by the husband. On
the other hand, the defendant testified that his wife told him, "she
was tired of keeping house; that she would put the furniture in
storage and move in a hotel, to which he objected, saying that it
was no place for him as he was a working man, working at the steel
mills, would come home black and would be ashamed to go into the
hotel, but that he consented to the arrangement and later told her

that that was no place for him; that he desired to move back into a flat, which she refused to do;" that after they separated, he had two conversations with her in which he requested her to come and live with him in a flat, which she refused to do, which is denied by the wife.

The record before us presents for our determination questions of fact. There was sufficient evidence on which to base the findings of the chancellor, and whether such evidence clearly preponderates in defendant's favor depends altogether upon the credibility of the witnesses, whom the opportunity to see as well as hear gave the chancellor a facility not possessed by us, one which has been referred to as of the greatest importance in determining the weight and credibility of evidence. (Coari v. Olsen, 91 Ill. 277; Johnson v. Johnson, 145 id. 510; Porter v. Porter, 182 id. 398; Columbia Theatre v. Abbit, 211 id. 122; Moore v. Moore, 335 id. 317; Doyle v. Doyle, 268 id. 96.) The husband has the right to select his domicile, and to change his residence, and it is the duty of his wife to accompany him, and if she refuses to go with him, he will not be bound to afford her a support and maintenance while she thus remains away from him without fault on his part. (Babbitt v. Babbitt, 69 Ill. 277; Houts v. Houts, 17 Ill. App. 439.) To justify a wife in leaving her husband, and absenting herself without giving him cause for divorce after the statutory period, his conduct must have been such as to authorize a divorce in her favor. (Carter v. Carter, 62 Ill. 439.) The complainant had the burden to show that she was living separate and apart from her husband without her fault. (Kingman v. Kingman, 150 Ill. App. 456.)

The chancellor saw the witnesses and observed their manner and appearance upon the witness stand and was better able to determine the weight to be accorded to the evidence of each witness. Their

that that was no place for them; that he realized it was been
into a flat, which she returned to day" that after they separated,
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and live with him in a flat, which she returned to day, which is
denied by his wife.

The record before us presents for our determination
questions of fact. There was sufficient evidence on which to base
the findings of the commissioner, and whether such evidence clearly
preponderates in defendant's favor depends upon the
credibility of the witnesses whom the commissioner is not so well
as have been the commissioner a fitting and proper to do, and
which has been returned to us of the greatest importance in deter-
mining the credit and credibility of witnesses. (Dowd v. Dowd,
81 Ill. 477; Johnson v. Johnson, 148 Ill. 641; Carter v. Carter,
180 Ill. 364; Columbia Theatre v. Wahl, 211 Ill. 1; Moore v.
Moore, 301 Ill. 417; Dodge v. Dodge, 338 Ill. 89.) The husband has
the right to select his domicile, and to change his residence, and
it is the duty of his wife to accompany him, and if she refuses to
go with him, he will not be bound to afford her a support and main-
tenance while she thus remains away from him without fault on his
part. (Roberts v. Roberts, 77 Ill. 709; Davis v. Davis, 2 Ill.
App. 429.) To justify a wife in leaving her husband, and remaining
herself without giving him cause for divorce after the statutory
period, his conduct must have been such as to authorize a divorce in
her favor. (Hudson v. Hudson, 9 Ill. App. 430.) The complainant had
the burden to show that she was living separate and apart from her
husband without her fault. (Kingman v. Kingman, 180 Ill. App. 428.)

The commissioner saw the witnesses and observed their manner
and appearance upon the witness stand and was better able to determine
the weight to be accorded to the evidence of each witness. Their

fairness and candor, their prejudice and feeling, or the reverse if such existed, were apparent to him. The credibility of the witnesses and the weight to be given their testimony are so largely matters resting with the chancellor that his conclusions upon the facts will not be disturbed unless the record discloses that such conclusions are manifestly against the preponderating force of the evidence, and from this record we cannot say that the chancellor erred.

It is contended by the complainant that the chancellor erred in directing her to deliver up to the defendant the furniture and household goods purchased by the defendant. It is admitted by the complainant in her testimony that the defendant did purchase the furniture. We therefore find no error in the decree directing her to turn over to the defendant the said furniture.

We think the record is free from reversible error, that the decree of the Circuit Court is sustained by the evidence, and it is therefore affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

fairness and candor, their prejudice and feeling, or the reverse if such existed, were urged and to bias. The credibility of the witnesses and the weight to be given their testimony are so largely matters resting with the chancellor that his conclusions upon the facts will not be disturbed unless the proofs clearly show that such conclusions are manifestly against the preponderating force of the evidence, and from this record we cannot say that the chancellor erred.

It is contended by the complainant that the chancellor erred in directing her to deliver up to the defendant the furniture and household goods purchased by the defendant. It is admitted by the complainant in her testimony that the defendant did purchase the furniture. We therefore find no error in the decree directing her to turn over to the defendant the said furniture.

We think the record in this case fully sustains the decree of the circuit court in matters of the evidence, and it is therefore affirmed.

Affirmed.

Chambers, J., Pit and Brickell, J.J., concur.

34605

LEON L. LOEHR, Administrator of the Estate of Albert Dickinson, deceased, (successor to Charles S. Quinlan, Executor of said will),
Complainant,

vs.

EMMA BENHAM DICKINSON et al.,
Defendants.

CHICAGO HISTORICAL SOCIETY,
Appellant,

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

261 I.A. 643

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal by the Chicago Historical Society from a decree construing the will of Albert Dickinson, deceased, brings that instrument to our attention a second time. In Boyles v. Dickinson, 249 Ill. App. 647, we construed the fourth clause of the will containing a bequest in favor of Charles Dickinson Boyles which the present record discloses he has permitted to lapse by voluntary election not to comply with its conditions. The decree from which this appeal is taken was entered upon the supplemental bill filed by the administrator de bonis non with the will annexed. The occasion for further construction of the will arises out of the fact that it now appears probable that the assets of the estate will be found insufficient to pay in full all the legacies bequeathed, and the court was therefore asked to direct the trustees whether it was the intention of the testator that in such case certain of the legacies should be preferred to others and paid in full to the exclusion of any or all the rest, or whether in such case certain legacies should abate pro rata.

It is conceded, as all the cases hold, that the sole object of construction must be to ascertain the intention of the testator as the same appears to be expressed in the whole document.

No. 1

JOHN J. LEMON, administrator of the Estate of Albert Dickinson, deceased, (successor to Charles S. Dupont, Executor of said will),

Complainant,

vs.

JOHN HANNAH DICKINSON et al.,

Defendants.

CHICAGO HISTORICAL SOCIETY,

Appellant,

APPEAL FROM CHANCERY

COURT OF COOK COUNTY.

SCHIA.643

MR. CHIEF JUSTICE FULLER DELIVERED THE OPINION OF THE COURT.

This appeal by the Chicago Historical Society from a decree construing the will of Albert Dickinson, deceased, brings that instrument to our attention a second time. In Dupont v. Dupont, 182 Ill. 477, we considered the twelfth clause of the will containing a bequest in favor of Charles Dickinson Boylse which the present record discloses he was permitted to lapse by voluntary election not to comply with its conditions. The decree from which this appeal is taken was entered upon the supplemental bill filed by the administrator de bonis non with the will annexed. The occasion for further construction of the will arises out of the fact that it now appears probable that the assets of the estate will be found insufficient to pay in full all the legacies bequeathed, and the court was therefore asked to direct the trustees whether it was the intention of the testator that in such case certain of the legacies should be preferred to others and paid in full to the exclusion of any or all the rest, or whether in such case certain legacies should abate pro rata.

It is conceded, as all the cases hold, that the main object of construction must be to ascertain the intention of the testator as the same appears to be expressed in the whole document.

The last will and testament of Albert Dickinson, deceased, consists of two writings: (1) his original will, executed on June 29, 1920, which contains nine articles; (2) the codicil thereto, executed on October 27, 1923, which contains five paragraphs.

In the original will Article I directs the payment of just debts, funeral expenses and taxes of all kinds. Article II makes specific bequests to the testator's wife. Article III devises an interest in certain real estate to the testator's nephew, Charles D. Boyles. Article IV makes a bequest to Boyles under conditions which, as already stated, he elected not to fulfill, thus causing the same to lapse. Several items, however, appear in this article, one of which may be useful in ascertaining the intention of the testator. The second paragraph of said Article IV provides:

> "Upon the death of my said nephew this trust shall cease as to said fund, and said Trustees, or the survivor of them, shall pay, deliver and convey said fund, together with all accumulations thereon unexpended, share and share alike, to those corporations which are the legatees and devisees of my residuary estate as hereinafter provided; provided, however, that if all or a part of the legacies and bequests made in Articles V and VI of this my will shall not have been paid in full, said trust estate shall first be applied to the payment of said legacies and bequests in the same manner as if this trust estate had constituted part of my general estate at the time of my death."

By Article V the testator gives specific bequests to certain cousins, nieces and a nephew; creates a trust of $50,000 with directions that the income shall go to the testator's sister during her natural life, and after her death, to Rachel Yates Boyles, the widow of his nephew, Thomas D. Boyles, and finally directs that when the trust shall cease -

> "*** thereupon my said Trustee is directed to pay, deliver and convey said trust fund, together with all accumulations thereon unexpended, share and share alike, to those corporations which are the legatees and devisees of my residuary estate as hereinafter provided; provided, however, that if all or a part of the legacies and bequests made in Articles V and VI of this my will shall not have been paid in full, said fund shall first be applied to the payment of said legacies and bequests in the same

The last will and testament of Albert Dickinson, deceased, consists of two writings: (1) his original will, executed on June 28, 1920, which modifies some provisions of the codicil thereto, executed on October 27, 1932, which contains five paragraphs.

In the original will Article I directs the payment of just debts, funeral expenses and taxes of all kinds. Article II makes specific bequests to the testator's wife. Article III devises an interest in certain real estate to the testator's nephew, Charles D. Doyles. Article IV makes a bequest to Doyles under conditions which, as already stated, he elected not to fulfill, thus causing the case to issue. Several items, however, appear in this article, one of which may be useful in ascertaining the intention of the testator. The second paragraph of said Article IV provides:

"Upon the death of my said nephew this trust shall cease as to said fund, and said trustee, or the survivor of them, shall pay, deliver and convey said fund, together with all accumulations thereon, unpaid and unsold, to those entitled to the property which are the legatees and devisees of my residuary estate as hereinafter provided; provided, however, that if all or a part of the legacies and bequests made in Articles V and VI of this my will shall not have been paid in full, said fund shall first be applied to the payment of said legacies and bequests in the same manner as if this trust estate had continued and existed at the time of my death."

By Article V the testator gives specific bequests to certain cousins, nieces and a nephew; creates a trust of $50,000 with directions that the income shall go to the testator's sister during her natural life, and after her death, to Rachel Yates Doyles, the wife of his nephew, Thomas D. Doyles, and finally directs that when the trust shall cease -

"and thereupon my said Trustee is directed to pay, deliver and convey said fund, together with all accumulations thereon unexpended, unsold and unpaid, to those entitled, in same proportions with me the legatees and devisees of my residuary estate as hereinafter provided; provided, however, that if all or a part of the legacies and bequests made in Articles V and VI of this my will shall not have been paid in full, said fund shall first be applied to the payment of said legacies and bequests in the same

manner as if this fund had constituted part of my general estate at the time of my death."

This article creates a further trust in favor of the son of the testator's nephew, Thomas D. Boyles.

Article VI provides:

"After the payment of the foregoing bequests, I give and bequeath to the following corporations, not for pecuniary profit, the sums of money set opposite their respective names, and upon the respective terms and conditions following:

"1. To the Academy of Sciences, now located in Lincoln Park in the city of Chicago, in the State of Illinois, the sum of One Hundred and Fifty Thousand Dollars ($150,000). This bequest to said Academy of Sciences is given upon the trusts following: That the Board of Trustees of said Academy shall, with the proceeds thereof, build an appropriate building for the work and purposes of said Academy, to be known as Dickinson Hall, in which building there shall be among other things, an audience room which may be used for lectures upon food supplies and the values of foods, and such other subjects as may from time to time be deemed beneficial to the public. If there shall remain in the hands of said Board of Trustees any money after said building hereinabove referred to shall have been paid for, said Board of Trustees shall have the right to use said remaining money, principal and income, for the purposes of the Academy, in such manner absolutely as to said Board of Trustees may seem wise.

"2. To the Chicago Historical Society, a corporation of the State of Illinois, the sum of Sixty Thousand Dollars ($60,000) and I direct that the Board of Trustees of said Society shall have the right to use the principal and income thereof for the purposes of the Society, in such manner absolutely as to them may seem wise.

"3. To the Glenwood Manual Training School, a corporation of the State of Illinois, the sum of Fifty Thousand Dollars ($50,000). I direct that the Board of Trustees of said school shall have the right to use the principal and income thereof for the purposes of the School, in such manner absolutely as to said Board of Trustees may seem wise; but if said School shall not have an adequate gymnasium or drill hall at the date of the above legacy to it, I shall be glad if this bequest to said School is used towards the payment of the cost of erection of such gymnasium or drill hall.

"4. To the Allendale Association, a corporation of the State of Illinois, located at Lake Villa, Illinois, the sum of Fifty Thousand Dollars ($50,000).

This bequest to the Allendale Association is given upon the trusts following: that the Board of Trustees of said Association shall, with the proceeds thereof, build a cottage or other appropriate building for the work and purposes of said Association, which building I request shall bear the name of my brother-in-law, Charles C. Boyles, in appreciation of his interest in the work of the Association. If there shall remain in the hands of said Board of Trustees any money after said building hereinabove referred to shall have been paid for, said Board of Trustees shall have the right to use said remaining money, principal and income, for the purposes of the Association, in such manner absolutely as to the said Board of Trustees may seem wise.

"5. To the Library Association of Orange City, of Orange

[illegible] as if this land had [illegible] by [illegible] at the time of my death."

This article invites a further issue in favor of the non of the testator's nephew, Simeon G. Hopkins.

Article VI provides:

"After the payment of the foregoing bequests, I give and bequeath to the Illinois, [illegible], but for [illegible] purpose, the sums of money set opposite their respective names, and upon the respective terms and conditions following:

"1. To the Academy of Sciences, now located in Lincoln Park in the city of Chicago, on the shore of Illinois, the sum of one hundred and fifty thousand dollars [illegible]. This bequest is made subject to [illegible] is given upon the terms following: That the board of trustees of said Academy shall, with the proceeds thereof, build or [illegible] for the work and purposes of said Academy, which building shall be [illegible] in the [illegible] place which may be used for [illegible] and the values of [illegible], and such other subjects as may from time to time be deemed beneficial to the public. If there shall remain in the hands of said Board of Trustees any money after said building [illegible] to which said Board of Trustees may apply [illegible] said Board of Trustees shall have the right to use said remaining money, principal and income, for the purposes of the Academy [illegible] as to the said Board of Trustees may seem wise.

"2. To the Illinois Institute of Technology, a [illegible] of the State of Illinois, the sum of fifty thousand dollars [illegible]. I direct that the board of trustees of said [illegible] shall have the right to use the principal and income thereof for the purposes of the school, in such manner absolutely as to them may seem wise.

"3. To the Chicago Central Training School, a [illegible] of the State of Illinois, the sum of fifty thousand dollars [illegible]. I direct that the board of trustees of said [illegible] shall have the right to use the principal and income thereof for the purposes of the school, in such manner absolutely as to said board of trustees may seem wise; but if said School shall not have an adequate gymnasium or drill hall at the date of the above legacy to it, I shall be glad if this bequest be paid [illegible] said trustees the proceeds of the sale of [illegible] such gymnasium or drill hall.

"4. To the Illinois Academy of Sciences, a [illegible] of the State of Illinois, located at Lake Villa, Illinois, the sum of fifty thousand dollars [illegible].

This bequest to the Illinois Academy of Sciences is given upon the express [illegible]: that the board of trustees of said Association shall, with the proceeds thereof, build a building or other [illegible] for the work and purposes of said Association, which building I request shall bear the name of my brother-in-law, Charles C. Hopkins, in commemoration of his interest in the work of the Association. If there shall remain in the hands of said board of Trustees any money after said building [illegible] to which shall have been paid for, said board of Trustees shall have the right to use said remaining money, principal and income, for the purposes of the Association [illegible] as to the said Board of Trustees may seem wise.

"5. To the Library Association of Bureau City, of Bureau

City, in the State of Florida, the sum of Ten Thousand Dollars ($10,000).

"I direct that said bequest to said Association shall be by the Board of Trustees of said Association kept forever separate and intact, and invested in safe interest-bearing securities and the income therefrom forever used for the support and maintenance of said Association and for the prosecution of the work for which it is incorporated.

"6. (a) To the Chicago Lying-In Hospital and Dispensary, a corporation of the State of Illinois, the sum of Fifty Thousand Dollars ($50,000) upon the distinct condition that its Board of Directors shall have the right to use the principal and income thereof for the purposes of the Hospital, in such manner absolutely as to said Board of Directors may seem wise.

"(b) To the Chicago Lying-In Hospital and Dispensary, a corporation of the State of Illinois, the further sum of Fifty Thousand Dollars ($50,000), I direct that said last named bequest shall be forever known as the 'Emma Benham Dickinson Fund,' and shall be kept forever separate and intact, and held and managed in perpetuity by the said Chicago Lying-In Hospital and Dispensary, and that the income therefrom shall be used and applied for the uses and purposes of said Hospital, in such manner and form as to its Directors shall seem best.

"7. To the United Charities of Chicago, a corporation of the State of Illinois, the sum of Twenty-five Thousand Dollars ($25,000) for the exclusive use of the Legal Aid Bureau of said corporation, in memory of my friend Rudolph Katz, a former President of said Society.

I direct that said bequest to the United Charities of Chicago for the use of said Legal Aid Bureau shall be by the Board of Directors of said corporation kept forever separate and intact, and invested in safe, interest-bearing securities, and the income therefrom forever used for the support and maintenance of said Legal Aid Bureau and the prosecution of the work of said Bureau.

"8. To the Visiting Nurse Association of Chicago, a corporation of the State of Illinois, the sum of Ten Thousand Dollars ($10,000) to be by the Directors of said corporation kept forever separate and intact and invested in safe, interest-bearing securities, and the income therefrom to be forever used for the support and maintenance of said Association, and the prosecution of the work for which it is incorporated."

Article VII devises the residue and remainder of the estate. Article VIII names the nephew Boyles trustee under the provisions of Article V and gives directions as to the administration of the estate. Article IX names Boyles executor and provides, after granting powers to manage, sell, lease, convey, etc., -

"I desire that the bequests in this Will contained shall be paid as soon as possible; but in order that my estate may not be sacrificed, I direct that my Executor shall have the period of five (5) years from and after my decease within which to administer my Estate and to pay the bequests in this will contained, if in his judgment it is for the best interests of my Estate and of the Legatees hereunder that my estate remain open for said period or any part thereof."

life, in the state of Florida, the sum of Ten Thousand Dollars ($10,000).

"I direct that said bequest to said Association shall be by the legal of Trustees of said Association been forever separate and inform, and invested in safe interest-bearing securities and the income therefrom used for the support and maintenance of said Association and for the prosecution of the work for which it is incorporated.

"5. (a) To the Chicago Lying-in Hospital and Dispensary, a corporation of the State of Illinois, the sum of Fifty Thousand Dollars ($50,000) upon the distinct condition that the board of Directors shall have the right to use the principal and income thereof for the purposes of the Hospital, in such manner absolutely as the said board of Directors may deem wise.

"(b) To the Children's Lying-in Hospital and Dispensary, a corporation of the State of Illinois, the further sum of Fifty Thousand Dollars ($50,000), I direct that said last named bequest shall be invested by the Trustees thereof as the Trustees deem desirable, and shall be kept forever separate and intact, and held and managed in perpetuity by the said Children's Lying-in Hospital and Dispensary, and that the income therefrom shall be used and applied for the care and purposes of said Hospital, in such manner and form as the Directors shall deem best.

"6. To the Public Libraries of Chicago, a corporation of the State of Illinois, the sum of Twenty-Five Thousand Dollars ($25,000) for the erection and furnishing of a building for the use of said Public Libraries in the City of Chicago, Illinois, to be known as the Henry Ward Beecher Memorial Library, and invested in safe, interest-bearing securities, and kept forever separate and intact and invested in safe, interest-bearing securities, and the income therefrom used for the support and maintenance of said Legal Aid Bureau and the prosecution of the work of said Bureau.

"7. To the Public Library, a corporation of Illinois, a corporation of the State of Illinois, the sum of Ten Thousand Dollars ($10,000) for the erection of a building for the use of said Public Library in the City of Chicago, Illinois, to be known as the Henry Ward Beecher Memorial Library, and invested in safe, interest-bearing securities, and kept forever separate and intact and invested in safe, interest-bearing securities, and the income therefrom used for the support and maintenance of said Legal Aid Bureau and the prosecution of the work of said Bureau.

"8. To the Public Library, a corporation of Illinois, a corporation of the State of Illinois, the sum of Ten Thousand Dollars ($10,000) to be used by the Directors of said Library forever separate and intact, and invested in safe, interest-bearing securities, and the income therefrom used for the support and maintenance of said Legal Aid Bureau and the prosecution of the work of said Bureau.

"9. To the Public Library, a corporation of Illinois, a corporation of the State of Illinois, the sum of Ten Thousand Dollars ($10,000) to be used by the Directors of said Library forever separate and intact, and invested in safe, interest-bearing securities, and the income therefrom used for the support and maintenance of said Legal Aid Bureau and the prosecution of the work of said Bureau.

"10. To the Public Library, a corporation of Illinois, a corporation of the State of Illinois, the sum of Ten Thousand Dollars ($10,000) to be used by the Directors of said Library forever separate and intact, and invested in safe, interest-bearing securities, and the income therefrom used for the support and maintenance of said Legal Aid Bureau and the prosecution of the work of said Bureau.

"11. To the Public Library, a corporation of Illinois, a corporation of the State of Illinois, the sum of Ten Thousand Dollars ($10,000) to be used by the Directors of said Library forever separate and intact, and invested in safe, interest-bearing securities, and the income therefrom used for the support and maintenance of said Legal Aid Bureau and the prosecution of the work of said Bureau.

"12. To the Public Library, a corporation of Illinois, a corporation of the State of Illinois, the sum of Ten Thousand Dollars ($10,000) to be used by the Directors of said Library forever separate and intact, and invested in safe, interest-bearing securities, and the income therefrom used for the support and maintenance of said Legal Aid Bureau and the prosecution of the work of said Bureau."

Article VII devises the residue and remainder of the estate. Article VIII names the member Boylan trustee under the provisions of Article V and gives direction as to the administration of the estate. Article IX names Boylan executor and provides after granting powers to manage, sell, lease, convey, etc., ...

"I desire that the bequests in this Will contained shall be paid as soon as possible; but in order that my estate may not be sacrificed, I leave work my executor shall deem the period of time (?) proper then and after my decease within which to administer my estate and to pay the bequests in this will contained. If in his judgment it is for the best interests of my Estate and of the bequests hereunto that my entire residue be held for said period or any part thereof."

The codicil by the first paragraph appoints Charles S. Quinlan and Leon L. Loehr co-trustees with Charles D. Boyles and makes provisions in case of a vacancy among the trustees. The second paragraph states:

> "In addition to the specific bequests in Article V of my will, I give to Rachel Yates Boyles the sum of Ten Thousand Dollars ($10,000)."

The third paragraph is as follows:

> "In view of the fact that there may be no ready market for the sale of some of the assets of my estate I direct that my property after the dispositions made in Article I, II and III of my will shall be paid to my Trustees and that they shall set up the trusts and pay all the legacies without interest which are mentioned in my Will and in this Codicil, and my said Trustees may delay the payment of such legacies in order to fully realize upon my estate or for any other reason in their discretion; but said legacies shall be paid as rapidly as possible in the order in which they are named and all of them shall be paid within ten (10) years after my death."

Paragraph 4 gives to the trustees power to manage, sell, lease, etc., and directs that they may employ any one of their own number as agent or attorney at law or in fact, while paragraph 5 appoints Charles S. Quinlan executor with all powers specified in the will instead of Charles D. Boyles and directs that he be not required to furnish any surety on his bond as such executor.

The decree finds that all the bequests and devisees contained in Articles II and V of the will have been fully set up in the hands of the trustees, and these payments are by the decree approved and confirmed. The decree further finds:

> "It was the intention of the testator that in the event the assets of his estate should prove to be insufficient to pay in full all of the legacies contained in Article VI of his will, the legacies contained in said Article VI should abate proportionately. The following provisions in paragraph 3 of his codicil viz.: 'but said legacies shall be paid as rapidly as possible in the order in which they are named and all of them shall be paid within ten (10) years after my death'-- was intended by the testator as administrative only and does not indicate that he anticipated any lack of funds to pay all the charitable legacies in full."

The decree adjudges that the property found to constitute the trust fund described in Article IV is now a part of the

The ballot by the first paragraph opposite Question 5, Quinlan and Lane 5. Under co-trustees with Question 3, Boyle and make provision in case of a vacancy among the trustees. The second paragraph states:

"In addition to the specific bequests in Article V of my will, I give to Rachel Taylor Doyle the sum of Ten Thousand Dollars ($10,000)."

The third paragraph is as follows:

"In view of the fact that there may be no ready market for the sale of some of the assets of my estate I direct that my executory order the discretionary sale in Article 1, II and III of my will shall be paid to my trustees and that they shall set up the trusts and pay all the income without interest which are mentioned in my will to the beneficiaries. And my said trustees may defer the payment of such income in order to retain upon my estate or for any other reason in their discretion; but said legatees shall be paid as rapidly as possible in the order in which they are named and all of them shall be paid within ten (10) years after my death."

Paragraph 4 gives to the trustees power to manage, sell, lease, etc., and directs that they may employ any and of their own number or agent or attorney at law as it fact, while paragraph 5 constitutes Quinlan 5. Quinlan executor with all powers specified in the will instead of Question 3. Boyle and Gordon Smith be not required to furnish any security on his bond as such executor.

The decree finds that all the bequests and devises contained in Articles II and V of the will have been fully set up in the books of the trustees, and those payments are by the decree approved and confirmed. The decree further finds:

"It was the intention of the testator that in the event the assets of his estate should prove to be insufficient to pay in full all of the legacies contained in Article VI of his will, the legacies contained in said Article VI should abate proportionately. The following provisions in paragraph 2 of his codicil read: 'But said legacies shall be paid as rapidly as possible in the order in which they are named and all of them shall be paid within ten (10) years after my death'-- was intended by the testator as administrative only and does not indicate that he anticipated any lack of funds to pay all the charitable legacies in full."

The decree adjudges that the property found to constitute the trust fund described in Article IV is now a part of the

general estate of Albert Dickinson and that when sold the proceeds shall be applied, subject to rights of Charles Dickinson, together with other assets remaining in the general estate, to the payment of the legacies contained in Article VI of the will and all the rest, residue and remainder thereof in equal shares to the beneficiaries named in Article VII of the will, and that "in the event the assets of the estate of Albert Dickinson shall prove to be insufficient to pay in full all of the legacies contained in Article VI of his will, the legacies contained in said Article VI shall abate proportionately."

The Chicago Historical Society complains of this decree in two respects. The bequest of $60,000 to it is second in the order named under Article VI of the will, and it is preceded only by a legacy of $150,000 to the Chicago Academy of Sciences and is followed by legacies to six other corporations. The aggregate amount of all the legacies in Article VI is $455,000. The aggregate of the legacies named in order after that of the Historical Society amounts to $245,000. The Society contends that it was the intention of the testator to create a preference over these latter legacies in favor of the Society and that the decree is erroneous in providing otherwise. It also contends that if the court properly construed the will in this respect, it then erred in holding that the legacies named under Article V of the will were entitled to priority and in approving the payments thereof made by the administrator.

The circumstances under which the codicil was executed appear in the record and were described with some degree of fullness in the opinion filed upon the former appeal. These circumstances were testified to in detail by the attorney for Albert Dickinson, who drew the codicil to the will and who was his trusted legal adviser and well informed as to the general conditions of

general estate of Albert Blackmon, and that same only the estate shall be applied, subject to rights of Charles Blackmon, together with other assets remaining in the general estate, to the payment of the legacies contained in Article VI of the will and all the rest, residue and remainder devised in equal shares to the benefi- ciaries named in Article VII of the will, and that "in the event the assets of the estate of Albert Blackmon shall prove to be insuf- ficient to pay in full all of the legacies contained in Article VI of his will, the legacies contained in said Article VI shall abate proportionately."

The Chicago Historical Society sought one of this be- ques in two respects. The bequest of $20,000 to it is unusual in the other based under Article VI of the will, and it is preceded only by a legacy of $130,000 to the Chicago Academy of Sciences and is followed by legacies to its sister institutions. The multiple amount of all the legacies in Article VI is $600,000. The aggregate of the legacies named in order after that of the Historical Society amounts to $[illegible]. The Society contends that it was the inten- tion of the testator to create a preference over these latter legacies in favor of the Society and that the decree is erroneous in providing otherwise. It also contends that if the court prop- erly construed the will in this respect, it then erred in holding that the legacies named under Article V of the will were satisfied by priority and in approving the payments thereof made by the administrator.

The circumstances under which the codicil was executed appear in the record and were described with some degree of diffi- culty by the testator's first wife, the former widow. These circum- stances were described to in detail by the attorney for Albert Blackmon, who drew the codicil to the will and who was his trusted legal adviser and well informed as to the general conditions of

his estate and the various corporations which Albert Dickinson controlled. As on the former appeal, so here, the briefs of the parties argue many inferences favorable to their respective theories from facts and circumstances, a few of which it may be well to briefly set forth in order that the issues may be decided from the viewpoint of the testator's "arm-chair." The will in question was executed on June 29, 1920, the codicil on October 27, 1923. Albert Dickinson died April 5, 1925. He lacked one day of being 82 years of age. It appears from the testimony of his attorney that just before the execution of the codicil he had under consideration the execution of a new will and that a draft of such a will had been prepared. The attorney says:

> "I told Albert that his available assets were probably not great enough, or might not be great enough to pay all the legacies in his original will, and that was one of the matters I had in mind when I prepared this new draft of will.*** Albert then took my draft of the will himself and sat down in a chair near the window and spent a long time looking at it. When he got through reading it he shook his head and said, 'I don't understand.'*** I talked with Albert further about this will and he kept saying only one thing definitely that he wanted changed, and that was, he did not want Mr. Boyles as executor. I had previously talked with him about the size of his estate and I asked him whether he realized that situation and -- after he finished the will he said he did. I am now referring to this draft. I had not yet prepared the codicil. He said he understood about the fact he might not have enough money to reach all the legacies. That, and the fact he did not want Mr. Boyles as executor were the only two things which he stated definitely to me about the whole will. He discussed his charities, gifts to charity, and said he could not remember distinctly between the different charities and what they were. He said he recalled a few of them, but when he attempted to tell me what they were he became uncertain and said, 'I don't remember.' I therefore asked him whether he would like to have me abandon the draft of the will and prepare a codicil and he said he would. I then prepared a codicil embodying in it the only two features which he had clearly expressed himself about, and that was executed.***"

The gross estate of the testator, as shown by the stipulation of facts, was $1,756,894.06. The legacies given by the will, exclusive of the specific legacies and exclusive of the life estate for Charles D. Boyles, amount to $910,000. After payment of the debts, cost of administration and inheritance taxes, aggregating

his estate and the various conversations which Albert Dickinson controlled. As on the former occasion, so here, the brief of the parties argue many inferences favorable to their respective theories from facts and circumstances, a few of which it may be well to briefly set forth in order that the issues may be decided from the viewpoint of the testator's "arm-chair." The will in question was executed on June 7, 1930, one month to October 27, 1932. Albert Dickinson died April 3, 1933. He lacked one day of being 89 years of age. It appears from the testimony of his attorney that just before the execution of the contest he had under consideration the execution of a new will and that a draft of such a will had been prepared. The attorney says:

"I told Albert that his available assets were probably not great enough, or might not be great enough to pay all the legacies in his original will, and that he was one of the members I had in mind when I prepared this draft of a will. Mr. Albert then took my draft of the will himself and put him in a chair near the window and spent a long time looking at it. Then he got through reading it he began his head and said, 'I don't understand.' Mr. I talked with Albert further about this will and he kept saying that he was going to leave his property to charity, and that was, he did not want to. Saying he wanted. I had previously talked with him about the size of his estate and I asked him whether he realized that situation and -- after he finished the will he said he did. I am now refreshing in this draft. I had not yet prepared the codicil. He said he understood about the fact he might not have enough money to pay all the legacies. That, and the fact he did not want Mr. Boyles as executor were the only two things which he stated definitely to me about the whole will. He discussed his charities, gifts to charity, and said he could not remember definitely between the different charities and what they were. He said he recalled a few of them, but then he attempted to tell me what they were he became uncertain and said, 'I don't remember.' I therefore asked the witness he could give in case he changed the draft of the will and prepare a codicil and he said he would. I then prepared a codicil modifying it in the only two features which he had clearly expressed himself about, and that was executed."

The gross estate of the testator, as shown by the litigation of facts, was $1,758,804.00. The legacies given by the will, exclusive of the specific legacies and exclusive of the life estate for Charles W. Boyles, amount to $910,000. After payment of the debts, cost of administration and inheritance taxes, assuming

$123,243.35, there remained at the time of the testator's death available for the payment of legacies property of the value of $1,633,650.71. These figures are based upon the appraisal made for the purpose of determining the federal estate tax. The finding of the decree is that between the date of the will and the date of the decedent's death there were no substantial changes in the assets that he owned except (1) a conveyance of the real estate specifically devised in Article III, and (2) the creation of a trust fund amounting to about $35,000 for the benefit of Louise and Ruth Dickinson. More than a million dollars of the value of the estate as placed upon it by the executors for federal estate tax purposes, consists of stock in the Albert Dickinson Company and other allied companies. Of this amount only $77,250 has been thus far realized by sale of a small block of the stock. Without this stock, all the bequests except the charitable bequests given by Article VI have been paid, and the executors still have on hand in addition to the stock of the Albert Dickinson Company assets of about $156,000. The Albert Dickinson Company and its allied concerns incurred heavy losses for the years 1920 and 1921, but they made a profit for the year 1922 of $104,551.55. For the year 1923 there was a loss of $22,550.54.

The administrator joins with the Chicago Historical Society in urging that the court erred in construing the will as directing that in case of deficiency the legacies provided for in Article VI should abate pro rata, but he maintains that the decree was right in approving the payment of the legacies as already made and asks that it be affirmed in that respect. The parties to this cause have called our attention to a number of cases which it is claimed sustain their respective contentions, but as in most cases of this kind the facts of each particular case are so unlike those of any other that authorities are of little use except as they

$123,213.38, there remained at the time of the testator's death available for the payment of legacies a property of the value of $1,039,888.71. These figures are based upon the appraisal made for the purpose of determining the federal estate tax. The finding of the decree is that between the date of the will and the date of the decedent's death there were no substantial changes in the assets that be owned except (1) a conveyance of the real estate specifically devised in Article III, and (2) the creation of a trust fund amounting to about $35,000 for the benefit of Louise and Ruth Dickinson. More than a million dollars of the value of the estate as placed upon it by the executors for federal estate tax purposes, consists of stock in the Albert Dickinson Company and other allied companies. If this amount only $77,388 has been thus for realized by sale of a small block of the stock. Without this stock, all the property which the specifically bequeath given by Article VI have been sold, and the obligations still have to be met in addition to the stock of the Albert Dickinson Company assets of about $136,000. The Albert Dickinson Company and its allied companies incurred heavy losses in the 1920 and 1921, but only made a profit for the year 1922 of $104,321.35. For the year 1923 there was a loss of $28,000.84.

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announce the well known general rules which must be followed in the construction of wills. The primary purpose of all construction, of course, is to determine what was the actual intention of the testator, and this should be determined by considering the whole will and giving proper consideration to each and every part of it and, if at all possible, by harmonizing the same. If possible, each clause and sentence should be given some meaning and no provision rejected if it can be construed so that it will stand. The intention of the testator must, however, be determined finally from the language of the writing itself. While oral evidence is admissible for the purpose of showing the circumstances and conditions under which the testator executed his will, such evidence may not properly be used to vary the terms which the writing expresses. The intention of the testator must be found within the "four corners" of the writing.

In the first place, we entertain no doubt that the decree properly approved of the payment of the legacies and creation of the trusts provided for in the articles of the will preceding Article VI. That article, it will be noticed, begins with this phrase, "After the payment of the foregoing bequests, I give and bequeath," etc., immediately following which are the names of eight corporations to which bequests are made by the provisions of Article VI. That clause construed with the language which precedes it indicates the intention of the testator that the various corporations named in Article VI should not take anything until and after the payment of the prior bequests. The bequests named in Article V are all specific and are made to relatives who would naturally be the recipients of the testator's gifts and bounty. The gifts and bequests which follow are made upon the condition that these prior legacies shall first be paid, and the executor has rightly interpreted the will and carried out the intention of the

[illegible] the well known general rules which must be followed in the construction of wills. The primary purpose of all construction, of course, is to determine what was the actual intention of the testator, and this should be discovered by considering the whole will and giving proper consideration to each and every part of it and, if at all possible, by reconciling the same. If possible, each clause and sentence should be given some meaning and no provision rejected if it can be construed so that it will stand. The intention of the testator must, however, be determined finally from the language of the writing itself. While oral evidence is admissible for the purpose of showing the circumstances and conditions under which the testator executed his will, such evidence may not properly be used to vary the terms which the writing expresses; the intention of the testator must be found within the "four corners" of the writing.

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testator by paying them. Rexford v. Bacon, 195 Ill. 70; Appeal of Pennsylvania Co. in Waln's Estate, 109 Pa. 479; Gwynn's Estate, 204 N. Y. S. 88.

Chicago Historical Society argues first that at the time the original will was drawn the testator had in mind a possible deficiency of assets to pay the legacies in full provided for in Article V and VI, and therefore added the provision:

> "*** provided, however, that if all or a part of the legacies and bequests made in Articles V and VI of this my will shall not have been paid in full, said fund shall first be applied to the payment of said legacies and bequests in the same manner as if this fund had constituted part of my general estate at the time of my death."

It is pointed out that an identical provision was included in Article IV. We cannot regard this provision as requiring that construction. Articles IV and V both provide for the creation of certain trusts and then direct that at the time of the termination of the trusts the principal should be first used to pay any legacies not theretofore paid in full before the balance is conveyed to the devisees of the residuary estate. No inference can be drawn from these provisions that the testator contemplated any deficiency of assets to meet all the legacies provided for.

It is further contended that the provision in the codicil to the effect that the legacies named shall be paid as rapidly as possible "in the order in which they are named" also indicates that the testator had in mind a possible deficiency of assets, but any such construction can be adopted only by wholly disregarding the clause immediately following in the same sentence which provides, "And all of them shall be paid within ten (10) years after my death." The original will provided that the executor should have a period of five years in which to administer the estate and to pay the bequests, while the codicil in almost identical language provides that that period shall be extended to ten years

bequeath by paying them. Hartford v. Hanna, 193 Ill. 70; Appeal of Pennsylvania Co. in Talbot's Estate, 208 Pa. 479; Greene's Estate, 204 N. Y. 5, 95.

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after the death of the testator. It does not indicate, in our opinion, a possible deficit at the end of ten years, because it provides that all the legacies shall be paid by that time. The general rules applicable to a situation of this kind have been passed on in numerous cases, and the distinction between a provision in a will which merely directs a certain order of payment and one which creates a priority and preference as to actual rights and interest under the will is clear and fundamental. The onus lies on the party seeking priority, to show that such priority was intended by the testator. In Williams on Executors, 7th Amer. ed. vol. 2, p. 674, it is stated: "The proof of this must be clear and conclusive." The reason for the rule is that the testator in the absence of proof to the contrary is deemed to have supposed that his estate would be sufficient to answer the purposes to which he has devoted it. Jarman on Wills, 6th ed., vol. 2, p.2087, is to the same effect, and the author says:

> "As a general rule, legacies are payable pari passu, in whatever order they appear in the will; and no legacy has priority unless a clear intention appears. It is immaterial that the legacies are made payable at different dates or periods, or are given in succession, some being payable 'in the first place' or 'in the next place,' and others 'afterwards.'"

In Titus' Administrator v. Titus, 26 N. J. Eq. 111, there was a provision in the will that certain legacies should be paid "in the order in which they are stated, and out of the first moneys that shall come into his (the executor's) hands, after paying my debts and funeral expenses." The court said that the testator clearly did not contemplate a deficiency of assets to pay all of the legacies in full, because he expressly bequeathed the residue not therein disposed of; that the provision was intended merely to secure as speedy payment of the legacies as practicable; that it was designed to secure the order of payment but it was with the manifest expectation that there would be enough to pay all and to

after the death of the testator. It does not indicate, in our opinion, a possible deficit at the end of ten years, because it provides that all the legacies should be paid by that time. The general rules applicable to a situation of this kind have been passed on in numerous cases, and the distinction between a provision in a will which merely directs a certain order of payment and one which creates a priority and preference as to actual rights and interest under the will is clear and fundamental. The cases like as the early leading Scottish, in view that such priority was implied by the testator. In Williams on Executors, 7th ser. ed. vol. 2, p. 874, it is stated: "The proof of this must be clear and conclusive." The reason for the rule is that the testator in the absence of proof to the contrary is deemed to have supposed that his estate would be sufficient to answer the purposes to which he has devoted it. Jarman on Wills, 6th ed., vol. 2, p.8027, in to the same effect, and the author says:

> "As a general rule, legacies are payable out assets, in whatever order they appear in the will; and no legacy has priority unless a clear intention appears. It is important that the legacies are made payable at different dates or periods, or are given in succession, some being payable 'in the first place' or 'in the next place,' and others 'afterwards.'"

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spare. The court further said: "By it the testator intended merely a priority of administration, or in the realization and application of assets." This case comes pretty near to being on all fours with the case which must be decided here. In Lord Dunboyne v. Brander, 18 Beav. 313, 52 Eng. Rep.-- Full Reprint 123, a testator gave certain legacies and directed that they "should be invested in the order and become payable and paid in the manner therein mentioned." The assets were found to be insufficient, and it was contended that the legatees first mentioned should be preferred, but the master of the rolls, Sir John Romilly, pointed out the distinction between what he called "getting in and realization of the assets, and the giving a priority of rights and interests," and held that the whole scope of the will showed that there was no anticipation of any deficiency of assets and that there was no priority except as to the administration of the same. The basis of the rule is the equitable maxim that equity is equality and that in the absence of a clear intention to the contrary that maxim will be applied. As some of the cases say, a doubt defeats the priority. To the same effect is Miller v. Huddlestone, 3 Mac. & G. 513; 42 Eng. Reports, Full Reprint 123. So also in Towle v. Swasey, 106 Mass. 100, the court said that the testator in the absence of clear proof to the contrary must be deemed to have acted on the belief that the estate would be sufficient to answer the purposes to which he devoted it, and that men do not ordinarily go through the formality of making wills and disposing of property which they do not own or do not reasonably hope to become possessed of. The court also said:

> "As between the legacies which are in their nature mere bounties, the presumption of intended equality will prevail, unless there is unequivocal evidence to the contrary; and no priority will be allowed where the expressions of the will are ambiguous. Shepard v. Guernsey, 9 Paige 357. 2 Williams on Executors 1233. Thwaites v. Forman, 1 Collyer 409."

See also Porter v. Howe, 173 Mass. 521, 54 N. E. 255; Swasey v.

ments. The court further said: "By is the territory involved merely a priority of administration, or in the venification and verification of assets." This case comes pretty near to being on all fours with the case which had by decided here. In Jane Dunlavoy v. Brandon, 18 Neb. 413, 25 Am. Rep.-- 1881 Hospital 153, a testator gave certain legacies and directed that they "should be paid in the order and become payable and paid in the manner therein mentioned." The assets were found to be insufficient, and it was contended that the legacies that mentioned should be preferred, but the master of the rolls, Sir John Kenyon, pointed out the distinction between what he called "vesting in and realization of the assets, and the giving a priority of rights and interests," and held that the whole scope of the will showed that there was no application of any deficiency of assets and that there was no priority except as to the administration of the same. The basis of the rule is the equitable maxim that equity is equality and that in the absence of a clear intention to the contrary that maxim will be applied. As some of the cases say, a doubt defeats the priority. In the case after in Wilder v. Wheldon, 2 Ind. 2 E. 613; 12 Ind. Reports, Full Reprint 123. He also in Taylor v. Spaine, 106 Eng. 170, the court said that the testator in the absence of clear proof to the contrary must be deemed to have acted on the belief that the estate would be sufficient to answer the purposes to which he devoted it, and that can in not arbitrarily so through the formality of making wills and disposing of property which they do not own or do not reasonably hope to ever possess of. The court also said:

"As between the legacies which are in their nature more bounties, the presumption of intended equality will prevail, unless there is unequivocal evidence to the contrary; and no priority will be allowed under the expressions of the will are ambiguous. Jenner v. Ignatius, 8 Ves. 267. 2 Williams on Executors 1121. Hughes v. Stevens, 1 Sollyer 420."

See also Tatem v. Chase, 177 Mass. 421, 59 N. E. 1021; Dunlavy v.

American Bible Society, 57 Me. 523.

Looking at the provision of the codicil from the standpoint most favorable to the contention of the Chicago Historical Society, it must be said that the provision does no more than create an ambiguity or doubt, and that for that reason the contention must fail. It is true that the affairs of the testator were somewhat complicated, but the condition of his estate, as we have already pointed out, was such that he might well have believed that a very large amount of money would be received by the Young Men's Christian Association of Chicago and the Old People's Home of Chicago, who were made his residuary legatees under trusts which were created of such kind and nature as must be held to show clearly his expectation that all prior legacies would be paid in full. There is this further observation, which is not without great weight. The will and the codicil were both drawn by lawyers of experience and ability, and the language appearing in both is such language as lawyers use. This is not the case of an unlearned or ignorant person failing to fully express an intention in a document carelessly drawn. We find it impossible to believe that (acting as the testator was under the immediate advice and direction of his counsel) if there had been any real anticipation of a possible deficit, the provision with reference thereto would have been made in doubtful or ambiguous language. It is impossible to determine that there was an intention to give priority as between these legatees. Any construction finding an intention to give such priority would be based on mere conjecture.

The attorney who drew the codicil says that when he discussed with the testator the question of the charities named in the will, the testator said "he could not remember distinctly between the different charities and what they were." Assuming this to be the actual situation, it is difficult to understand how it

Looking at the provision of the codicil from the standpoint most favorable to the contention of the Chicago Historical Society, it must be said that the provision does no more than evince an ambiguity or doubt, and that for that reason the contention must fail. It is true that the affairs of the testator were somewhat complicated, but the condition of his estate, as we have already pointed out, was such that he might well have believed that a very large amount of money would be received by the Young Men's Christian Association of Chicago and the Old People's Home of Chicago, who were made his residuary legatees under trusts which were created of such kind and nature as must be held to show clearly his conception that all prior legacies would be paid in full. There is this further consideration, very, in our without great weight. The will and the codicil were both drawn by lawyers of experience and ability, and the language appearing in both is such language as lawyers use. This is not the case of an unlearned or ignorant person failing to fully express an intention in a document carelessly drawn. We find it impossible to believe that (nothing on the testator was under the immediate advice and direction of his counsel) if there had been any real misapprehension of a possible deficit, the provision with reference thereto would have been made in doubtful or ambiguous language. It is impossible to determine that there was an intention to give priority as between these legacies. Any construction finding an intention to give such priority would be based on mere conjecture.

The attorney who drew the codicil says that when he discussed with the testator the question of the charities named in the will, the testator said "he could not remember distinctly between the different charities and what they were." Assuming this to be the actual situation, it is difficult to understand how it

could have been the intention of the testator in the execution of the codicil to create any right of priority as between this class of legatees or to prefer any one of them to the exclusion of another.

Moreover, an examination of the whole will including the codicil discloses that the legatees are classified with great care and that each class is put in a group by itself under one of the articles enumerated. The language which the testator uses indicates that he thought of these legacies not as individual items but as groups. When, therefore, in the codicil the testator directs that the legacies should be paid in the order in which they are named, it seems most reasonable to suppose that he referred to the group order rather than to the order in which the different items of the particular group are named.

For the reasons indicated the decree is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

would have been the intention of the testator in the exercise of the medium to create any right of priority as between such class of legatees or to prefer any one at least to the exclusion of another.

However, on consideration of the whole will including the medial clauses that the legatees are classified with great care and that each class is put in a group by itself under one of the artificial denominations. The language which the testator uses indicates that he thought of these legatees not as individual items but as groups. Then, therefore, in the medial the testator directs that the legacies should be paid in the order in which they are named, it seems most reasonable to suppose that he referred to the group order rather than to the order in which the different items of the particular group are named.

So the process adopted for testator is affirmed.

EXPENSES.

O'Connor and Moberly, JJ., concur.

34874

MARY VENN,
Defendant in Error,

vs.

EDWARD B. JOYCE,
Plaintiff in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

261 I.A. 643

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This writ of error demands a review of the record which discloses that on June 22, 1929, default of the defendant for failure to appear was taken, and upon hearing by the court a judgment was entered in favor of Theodore H. Venn, administrator of the estate of Mary Venn, and against defendant in the sum of $10,000.

There is no bill of exceptions. The record shows that on September 15, 1926, a praecipe was filed with the clerk of the Circuit court, directing him to issue a summons to Edward B. Joyce, defendant, in a plea of trespass on the case to the damage of Mary Venn, the original plaintiff, returnable to the November term, 1926, and demanding damages in the sum of $15,000. Alias and pluries summonses were issued at the suit of plaintiff, and September 26, 1927, another pluries summons was issued and returned as served on defendant on September 27, 1927. On November 9, 1927, a declaration was filed disclosing an action for negligence, whereby plaintiff was injured July 4, 1926, through the collision of two motor vehicles. December 10, 1927, the attorney for plaintiff suggested the death of Mary Venn, and it was ordered that the cause proceed in the name of her administrator, Theodore H. Venn. The order found also that due personal service of summons had been had on defendant at least ten days before the first day of the term; that he did not appear; that his default should be taken and entered of record. February 16, 1928, the

record recites that the cause was called for trial, and that plaintiff failing to prosecute her suit it was ordered that it be dismissed at her costs for want of prosecution; that she take nothing by her action, and that defendant recover costs from plaintiff.

On September 28th thereafter the record shows that an affidavit of Irving E. Reed was filed in the office of the clerk of the court. It is not preserved by bill of exceptions but purports to state facts as follows: That the affiant is the attorney of record for plaintiff; that on December 10, 1927, an order was entered giving leave to said attorney to amend the pleadings on their face, to substitute Theodore H. Venn as plaintiff and administrator for Mary Venn, the deceased plaintiff and defaulting defendant, for want of an appearance; that on February 16, 1928, affiant appeared before Judge Arnold when said cause was on the trial call and asked the court to put the cause on the past case calendar for the reason that affiant had not been able to get all of his witnesses together and bring them into court to prove up plaintiff's damages and for the further reason that Theodore H. Venn, deceased's husband, was suffering a severe shock on account of her death and was on the verge of a nervous breakdown and in no condition to come to court to testify; that said court thereupon ordered said cause to be put on the past case calendar; that when the new fall common law calendars were issued in September, 1928, he looked for said cause on the past case calendar and upon being unable to find it, he checked the court orders and files and found for the first time that the suit had been dismissed February 16, 1928, at plaintiff's costs.

The affidavit further states that plaintiff administrator has a good and meritorious cause of action against defendant, as alleged in the declaration theretofore filed, which was made a part of the affidavit; that said court was without jurisdiction to enter

record reveals that the cause was called for trial, and that plaintiff failing to prosecute her suit it was ordered that it be dismissed at her costs for want of prosecution; that she take nothing by her action, and that defendant recover from plaintiff.

On September 25th thereafter the record shows that an affidavit of Irving S. Reed was filed in the office of the clerk of the court. It is not preserved by bill of exceptions but purports to state facts as follows: That the affiant is the attorney of record for plaintiff; that on December 5, 1927, he asked and secured leave to said attorney to amend the pleadings on their behalf, to substitute Demetre A. Vann as plaintiff and substitute for Mary Vann, the deceased plaintiff and defending defendant, for want of an appearance; that on February 16, 1928, affiant appeared before Judge Arnold when said cause was on the trial call and asked the court to put the cause on the past case calendar for the reason that affiant had not been able to get all of his witnesses together and bring them into court to prove up plaintiff's damages and for the further reason that Demetre A. Vann, deceased's husband, was suffering a severe shock on account of her death and was on the verge of a nervous breakdown and in no condition to come to court to testify; that said court thereupon ordered said cause to be put on the past case calendar; that when the new full common law calendars were issued in September, 1928, he looked for said cause on the past case calendar and upon being unable to find it, he checked the court orders and files and found for the first time that the suit had been dismissed February 16, 1928, at plaintiff's costs.

The affidavit further states that plaintiff administrator for has a good and meritorious cause of action against defendant, as alleged in the declaration theretofore filed, which was made a part of the affidavit; that said court was without jurisdiction to enter

the order of February 16, 1928, providing for the dismissal of said suit at plaintiff's costs for the reason that there had been a previous order entered on December 10, 1927, defaulting defendant for want of appearance.

On the same day a motion was filed by said attorney to vacate the order of dismissal entered February 16, 1928, "for the reason that said court had no jurisdiction to enter said order, and it was therefore void."

June 22, 1929, Theodore H. Venn, the administrator of estate of plaintiff, filed an amended declaration in a single count in which he alleged the collision of a motor vehicle in which Mary Venn, deceased plaintiff, was riding, with a motor vehicle driven by defendant; that deceased was in the exercise of due care; that defendant failed to exercise due care "in that he operated said motor vehicle in such a wilful, wanton, dangerous, unlawful and reckless manner, with knowledge of the presence of deceased, and with the intention of causing an injury to her, and in total disregard of her rights and the rights of others, who were lawfully upon the said street," and as a consequence thereof the vehicles collided, by reason of which the deceased received injuries from which she died on July 9, 1927. The declaration alleged the appointment of an administrator and that deceased left surviving her certain heirs at law and next of kin who had sustained pecuniary damage by reason of her death.

The record recites that on June 22, 1929, upon motion of the administrator's attorney for a hearing to submit proof of damages sustained by the administrator, the court found that defendant was duly served with summons on September 27, 1927; that plaintiff's declaration was duly filed thereafter on November 9, 1927; that defendant was defaulted on December 10, 1927; and ordered that leave be thereby given plaintiff's attorney to withdraw three

the order of February 16, 1928, providing for the dismissal of said suit at plaintiff's costs for the reason that there had been a previous order entered on December 16, 1927, dismissing defendant for want of appearance.

On the same day a motion was filed by said attorney to vacate the order of dismissal entered February 16, 1928, "for the reason that said court had no jurisdiction to enter said order, and it was therefore void."

June 22, 1928, Mandeville E. Vann, the administrator of estate of plaintiff, filed an amended declaration in a single count in which he alleged the collision of a motor vehicle in which Mary Vann, deceased plaintiff, was riding, with a motor vehicle driven by defendant; that deceased was in the exercise of due care; that defendant failed to exercise due care "in that he operated said motor vehicle in such a careless, negligent, unlawful and reckless manner, with the knowledge of the presence of deceased, and with the intention of causing an injury to her, and in total disregard of her rights and the rights of others, who were lawfully upon the said street," and as a consequence thereof the vehicles collided, by reason of which the deceased received injuries from which she died on July 8, 1927. The declaration alleged the appointment of an administrator and that deceased left surviving her certain heirs at law and next of kin who had sustained pecuniary damage by reason of her death.

The record recites that on June 22, 1928, upon motion of the administrator's attorney for a hearing to submit proof of damage sustained by the administrator, the court found that defendant was duly served with summons on September 27, 1927; that plaintiff's declaration was duly filed therein on November 9, 1927; that defendant was defaulted on December 10, 1927; and ordered that there be should issue plaintiff's writ of inquiry in effecting there

counts of his declaration and to amend the fourth count by filing an amended declaration instanter; that the administrator waived a trial by jury and submitted evidence to the court in proof of damages. The court also found that the administrator had suffered and sustained damages as alleged in his declaration and awarded the same to the administrator and against defendant in the sum of $10,000, for which judgment was entered.

The controlling question in the case arises out of the contention of defendant that the court was wholly without jurisdiction to enter the order of September 28, 1928, setting aside the previous order of February 16, 1928, by which the cause of action was dismissed and judgment for costs entered against plaintiff. Defendant rests his contention upon the rule first announced in Cook v. Wood, 24 Ill. 295, which has ever since been consistently followed by the courts of this state to the effect that after the expiration of the term at which the final judgment or decree is entered, the court is wholly without jurisdiction to vacate its orders entered at the previous term except by a written motion in the nature of the common law writ of coram nobis in compliance with the procedure provided for in section 89 of the Practice act. Smith-Hurd's Ill. Rev. Stats. 1929, chap. 110, sec. 89. A few of the cases in addition to Cook v. Wood, above cited, which sustain this proposition are Billboard Publishing Co. v. McCarshan, 180 Ill. App. 539; Barnes v. Chicago City Ry. Co., 185 Ill. App. 148; Katauski v. Eldridge Coal Co., 255 Ill. App. 41.

The administrator argues, however, that defendant is in no position to question the order of September 28, 1928, reinstating the cause because no bill of exceptions was preserved, and cites a number of cases, such as Hickman v. Ritchey, 252 Ill. App. 560, and People v. Levin, 318 Ill. 227, holding that such an affidavit is no part of the common law record and that it must be in-

grounds of his demurrer and in sound the facts asked by filing an amended declaration instead; that the administrator waived a trial by jury and submitted evidence to the court in proof of damages. The court also found that the administrator had suffered and sustained damages in excess in the declaration and awarded the sum to the administrator and against defendant in the sum of $12,000, for which judgment was entered.

The controlling question in this case arises out of the contention of defendant that the court was wholly without jurisdiction to enter the order of September 25, 1923, setting aside the previous order of February 16, 1922, by which the cause of action was dismissed and judgment for costs entered against plaintiff. Defendant rests his contention upon the rule first announced in Cook v. Wood, 24 Ill. 295, which has been since uniformly followed by the courts of this state to the effect that after the expiration of the term at which the final judgment or decree is entered, the court is wholly without jurisdiction to vacate the order entered at the previous term except by a written motion in the nature of the common law writ of coram nobis in compliance with the procedure provided for in section 88 of the Practice Act. Smith-Hurd's Ill. Rev. Stats. 1923, chap. 110, sec. 88. A few of the cases in addition to Cook v. Wood, supra cited, which contain this proposition are Hillsboro Publishing Co. v. Gedermann, 180 Ill. App. 438; Barnes v. Chicago City Ry. Co., 190 Ill. App. 148; Kaufman v. Fairfield Coal Co., 288 Ill. App. 12.

The administrator admits, however, that defendant is in no position to question the order of September 25, 1923, vacating the order because no bill of exceptions was preserved, and cites a number of cases, such as Glenn v. Fisher, 102 Ill. App. 380, and People v. Lewis, 216 Ill. 227, holding that such an affidavit is no part of the common law record and that it must be in-

corporated in a bill of exceptions in order to be preserved.

The absence of a bill of exceptions does not avail the administrator under the facts disclosed by this record. The record shows that the court at the end of the term at which the order of dismissal was entered lost jurisdiction, and as was said in Morgan v. Campbell, 54 Ill. App. 242:

> "Jurisdiction having been once lost, and the term passed, the record must show that it was regained, and how, or the judgment has no basis. In Sweeney v. The People, 28 Ill. 208, it is said that 'on a writ of error, the party, to retain his judgment, must show a good record.' In Miller v. Glass, 14 Ill. App. 177, that rule was applied to a case, which being remanded by this court to the Superior court of Cook county, was there disposed of, and the record did not show that the party against whom the judgment went, had been notified that the remanding order had been filed."

The opinion quotes with approval from Hettrick v. Wilson, 12 Ohio St. 136, where the court said:

> "It has been suggested that where the record is silent on the subject, we must presume that the defendant below was regularly in court. But we cannot so hold in this case. For, however we might presume in favor of the validity of a judgment, where the parties are shown to have been before the court, and where they could, therefore, have made the error complained of appear affirmatively by exception or otherwise, yet no such presumption can be admitted to prevent the direct impeachment of a judgment, where the subject of the complaint is that the party has had no day in court, and so had no opportunity of placing anything upon the record."

In Buddy v. Washington Ins. Co., 67 Ill. App. 159, it was said:

> "On direct pleadings to review a judgment, the jurisdiction of the court over the person must appear by the record, or the judgment cannot be sustained."

Citing Law v. Grommes, 158 Ill. 492. To the same effect are Barnes v. Chicago City Ry. Co., 185 Ill. App. 148, and Harris v. Chicago House Wrecking Co., 314 Ill. 500.

If plaintiff is to prevail then it must be upon the theory that the order of reinstatement was entered on proceedings conforming to section 89 of the Practice act, which provides:

> "The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of

adjudicated in a bill of exceptions is error to be preserved.

The absence of a bill of exceptions does not avoid the administrator under the facts disclosed by this record. The record shows that the court at the end of the term at which the order of dismissal was entered lost jurisdiction, and as was said in Barnum v. Campbell, 54 Ill. App. 242:

> "Jurisdiction having once ceased, and the term passed, the record must show that it was regained, and not, as in the instant case no basis. In Swanson v. The People, 47 Ill. App. 18 it is said that 'on a bill of error, the court, to sustain its judgment, must show a good reason.' In Miller v. Chase, 11 Ill. App. 177, that rule was applied to a case, which being commenced by bill of error in the Superior court of Cook county, was later dismissed, and the record did not show that the party against whom the judgment was, had been notified that the proceeding after had been filed."

The opinion quoted with approval from Martin v. Milner, 17 Ohio St. 136, where the court said:

> "It has been suggested that unless the record is silent as to notice, we must presume that the defendant below was regularly in court. But we cannot do this in this case. For, however we might presume in favor of the validity of a judgment, where the parties are shown to have been before the court, and where they could, therefore, have made the usual conclusional of appearance, or voluntarily by execution of recognizance, yet on such presumption can be admitted to prevent the direct impeachment of a judgment, where the opinion of the majority is that the party has had no day in court, and as that an objectively of stating anything upon the record."

In Kelly v. Tennessee Ins. Co., 67 Ill. App. 130, it was said:

> "An direct proceeding to review a judgment, the jurisdiction of the court over the person must appear by the record, or the judgment cannot be sustained."

Citing Lee v. Swanson, 148 Ill. 443. In the same effect are Hinton v. Chicago City Ry. Co., 188 Ill. App. 148, and Martin v. Illinois Power Reporting Co., 221 Ill. App.

It plainly is to prevail then it must be upon the theory that the order of reinstatement was entered on proceedings conforming to section 68 of the Practice Act, which provides:

> "The writ of error herein provided is hereby abolished, and all errors in fact, brought in the proceedings of any court of

record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, non compos mentis or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years."

If the motion to reinstate is regarded as a proceeding under said section 89, it appears to be materially defective in two respects: (1) While the statute requires reasonable notice of the proceeding, it does not appear that any notice at all was given; and (2) the affidavit nowhere avers nor sets up facts tending to show that plaintiff was not negligent. While proceeding under sec. 89 is in some respects necessarily supplementary, the authorities all agree that it is in substance the beginning of a new suit; that the affidavit or petition takes the place of a declaration and that notice must be given to the opposite party. McGrath & Swanson Co. v. Chicago Rys. Co., 252 Ill. App. 476, cited and relied on by the administrator, is to this effect and declares that with respect to process, pleadings and judgments, the writ may be considered as a new and independent action, but it "is supplementary in its nature for the purpose of correcting errors committed in a preceding cause."

Plaintiff, however, says that the facts disclosed by the affidavit are sufficient to show diligence and cites Rosenthal v. Wald, 252 Ill. App. 383, where it was held that a judgment entered by default in the Municipal court of Chicago against defendant when the case was reached for trial, due to a misprision of the clerk of the court in not putting the cause at the foot of the docket under a court order that the case be stricken from the short cause calendar and placed in its usual place on the jury calendar, should have been vacated on motion. That case does not discuss the matter of diligence. As a matter of fact, the petition does not disclose any degree of diligence on the part of the attorney for plaintiff to

> remand, and which, by the general law, would have been warranted by said writ, may be interposed by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. Then the person entitled to make such motion shall be or infant, non compos mentis or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years."

If the motion to vacate is regarded as a proceeding under said section 68, it appears to be substantially defective in two respects: (1) While the statute requires reasonable notice of the proceeding, it does not appear that any notice at all was given; and (2) the affidavit supports only the allegations of Ennis insofar as those that plaintiff was an infant. While pleadings under sec. 68 in some respects somewhat equivocally, the authorities all agree that it is in substance the beginning of a new suit; that the affidavit or petition takes the place of a declaration and that service must be given on the opposite party. Eckhart v. Pennsylvania Co., 252 Ill. App. 472, cited and relied on by the administrator, is to this effect and decisions that with respect to process, pleadings and judgments, the writ may be considered as a new and independent action, but it "is supplementary in its nature for the purpose of correcting errors committed in a proceeding among."

Plaintiff, moreover, says that the facts disclosed by the affidavit are sufficient to show diligence and cites Hoenshel v. Wahl, 252 Ill. App. 555, where it was held that a judgment entered by default in the municipal court of Chicago against defendant when the case was reached for trial, due to a misprision of the clerk of the court in not putting the cause at the foot of the docket under a court order that the case be stricken from the short cause calendar and placed in its usual place on the jury calendar; should have been vacated on motion. That case does not discuss the matter of diligence. As a matter of fact, the position does not disclose any degree of diligence on the part of the attorney for plaintiff to

ascertain after February 16, 1928, whether the order to place said cause on the past case calendar had been in fact entered.

Plaintiff contends, citing McKurray v. Peabody Coal Co., 281 Ill. 218, that counsel had the right to rely on the announcement of the court to the same extent that he would rely on the rules of the court, and that it was not the duty of the attorney in the exercise of due diligence to ascertain either from the Law Bulletin or from the docket whether the clerk had entered the order as stated by the court. He further contends that there is no rule of statute or of court which provides that parties or their attorneys are bound to take notice of notices published in the Law Bulletin, and refers to Schick v. Durham, 209 Ill. App. 266, where it appeared that a party was misled by the publication in the Daily Municipal Court record of a statement to the effect that the cause was put upon the next jury calendar, while no such order was in fact made, and the court said that the party complaining was not justified in relying entirely on this publication. However, the affidavit here fails to show examination either of the Law Bulletin or of the docket of the court. Gburek v. Kuss, 255 Ill. App. 346; Coultry v. Yellow Cab Co., 252 Ill. App. 443; Lowe v. Krauepe, 320 Ill. 244, are cases where under facts quite similar to those appearing here it was held that the failure to discover the order which had been in fact entered amounted to negligence. However that may be, the proceedings are defective in that they fail to disclose that either reasonable notice as required by the statute or any kind of notice was in fact given to the opposite party.

Plaintiff further contends that the trial court was not without jurisdiction to enter final judgments against defendant and relies on rule 21 of the Circuit court of Cook county, which in part provides:

respondents after February 16, 1938, whether the order to plead made under the test case calendar had been in fact entered.

Plaintiff contends, citing Commonwealth v. Lindner, 124 Pa. Sup. Ct. 228, that counsel had the right to rely on the statement of the court to the same effect that he could rely on the rules of the court, and that it was not the duty of the attorney in the exercise of due diligence to ascertain either from the law Bulletin or from the docket whether the clerk had entered the order as stated by the court. He further contends that there is no rule of statute or of court which provides that parties or their attorneys are bound to take notice of notices published in the Law Bulletin, and refers to Sabion v. Burkes, 39 Pa. Sup. 564, where it appeared that a party was misled by the publication in the Daily Municipal Court record of a statement to the effect that the cause was put upon the next jury calendar, while no such order was in fact made, and the court said that the party complaining was not justified in relying entirely on this publication. However, the affidavit here fails to show consultation either of the Law Bulletin or of the docket of the court. Gburek v. Kunz, 328 Pa. Sup. 346; Gualtre v. Talley Cab Co., 94 Pa. Sup. 149; Long v. Stewart, 130 Pa. 361, are more nearly similar facts with similar to Smith case. Pointing here it was held that the failure to discover the order which had been in fact entered amounted to negligence. However that may be, the proceedings are defective in that they fail to disclose that either reasonable notice as required by the statute or any kind of notice was in fact given to the opposite party.

Plaintiff further contends that the trial court was not without jurisdiction to enter final judgments against defendant and relies on rule 23 of the District courts of Cook county, which in part provides:

"Where a party is in default for want of appearance no notice shall be required, except upon order of the court."

In this connection plaintiff cites section 39 of the Practice act which provides for amendments either of form or substance in any process, pleading or proceeding on such terms as are just and reasonable at any time before final judgment in a civil suit, and he also cites a long line of cases which hold that where a defendant has been duly summoned to court and does not enter his appearance, he is presumed in law to be constantly in court and is under the further presumption charged with notice that plaintiff by leave of court may make any amendment necessary to proceed with his cause of action. Bird-Sykes Co. v. McNamara, 252 Ill. App. 262; Bishoff v. The People, 171 Ill. 243; Ruppe v. Glos, 251 Ill. 80; Pease v. Rockford City Traction Co., 279 Ill. 513; Oberman v. Camden Fire Ins. Assoc., 314 Ill. 264, and many other cases are cited. Of course, all of this is in one sense immaterial, for if it be true, as we have held, that the court was without jurisdiction to set aside the order of February 16, 1928, which dismissed the action, then the jurisdiction acquired by the court through the service of its summons upon Joyce was ended and these presumptions would no longer exist as to him, but assuming the court had jurisdiction by reason of the affidavit submitted to reinstate the cause, it would not have jurisdiction without notice to defendant to permit the filing of a new declaration stating an entirely different cause of action from that defendant had been summoned to answer and to enter judgment thereon against defendant. Defendant is presumed to be present and to know what transpires in court with reference to the cause of action he was summoned to answer, but he is not presumed to know when summoned to answer at the suit of Mary Venn that he may also in his absence be called upon to answer in a statutory cause of action by the administrator of the estate of Mary Venn.

"Where a party is in default for want of appearance no notice shall be required, except upon order of the court."

In this connection plaintiff cites section 30 of the Practice act which provides for counterclaims claims of liens or mechanics in any process, pleading or proceeding as such terms are in law and reasonable at any time before final judgment in a civil suit, and he also cites a long line of cases which hold that where a defendant has been duly summoned to court and does not enter his appearance, he is presumed in law to be constructively in court and is under the further presumption charged with notice that plaintiff by leave of court may make any amendment necessary to proceed with his cause of action. Bird-Lyman Co. v. Schwartz, 172 Ill. App. 587; Kimbrough v. The Peoples, 171 Ill. 243; Cagney v. Cline, 188 Ill. 94; Fraser v. Northern City Traction Co., 198 Ill. 618; Chicago v. Center Pier Inc. Assoc., 314 Ill. 224, and many other cases are cited. Of course, all of this is in one sense immaterial, for if it be true, as we have held, that the court was without jurisdiction to set aside the order of February 16, 1928, which dismissed the action, then the jurisdiction acquired by the court through the service of its summons upon Joyce was ended and these presumptions would no longer exist as to him, but assuming the court had jurisdiction by reason of the affidavit submitted to relocate the cause, it would not have jurisdiction without notice to defendant to permit the filing of a new declaration stating an entirely different cause of action from that defendant had been summoned to answer and to enter judgment against defendant. Defendant is presumed to be present and to know what transpires in court with reference to the cause of action he was summoned to answer, but he is not presumed to know when summoned to answer at the suit of Mary Venn that he may also in his absence be called upon to answer in a statutory cause of action by the administrator of the estate of Mary Venn.

It is quite unnecessary to point out the distinction between the original cause of action brought by Mary Venn and the cause of action upon which her administrator finally obtained a judgment. The distinction between the two causes of action has been pointed out in Carlin v. Peerless Gas Light Co., 283 Ill. 142; Hartray v. Chicago Rys. Co., 290 Ill. 85; Bishop v. Chicago Rys. Co., 303 Ill. 273; Wilcox v. Bierd, 330 Ill. 571.

We hold in the first place that the court was without jurisdiction to reinstate the case after the expiration of the term at which it had been dismissed; that considering the affidavit for reinstatement of the case, from the viewpoint of the procedure of section 89 of the Practice act, the same was wholly insufficient, and that at any rate the order of the court permitting the filing of a declaration which stated an entirely different cause of action, defaulting the defendant thereon and entering judgment without notice, was erroneous.

For the reasons indicated the judgment is reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

It is quite unnecessary to point out the distinction between the original cause of action brought by Mary Ann and the action of action upon which her administrator finally obtained a judgment. The distinction between the two causes of action has been pointed out in Martin v. Employers Ins. Co., 240 Ill. 143; Hartman v. Chicago Ry. Co., 249 Ill. 49; Jackson v. Chicago City Ry. 253 Ill. 272; Kilmer v. Dixon, 290 Ill. 97.

We hold in the first place that the suit was without jurisdiction to maintain the case after the resignation of the form of which it had been discovered that constituting the officers for reinstatement or its case. Upon the expiration of the jurisdiction of section 22 of the Practice Act, the case was wholly insufficient, and thus at any rate the order of the court permitting the filing of a declaration which stated an entirely different cause of action, defeating the defendant therein and entering judgment without notice, was erroneous.

For the reasons indicated the judgment is reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

O'Connor and Lehmann, JJ., concur.

34889

TRIANGLE STATE BANK,
a Corporation,
Appellant,

vs.

MILFORD F. HENKEL,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

261 I.A. 643

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On February 6, 1930, plaintiff bank confessed a judgment in the sum of $5098.70 against defendant upon two promissory notes. On motion of defendant supported by an affidavit the judgment was opened up, and it was ordered that the affidavit stand as an affidavit of merits. The cause was submitted to a jury, and at the close of all the evidence plaintiff moved for an instructed verdict in its favor, which was denied. The jury returned a verdict for defendant upon which the court, overruling motions for a new trial and in arrest, entered judgment.

It is contended by plaintiff that the court erred in refusing the instruction and that under the facts on the authority of American National Bank v. Woolard, 342 Ill. 148, the judgment should be reversed here with directions to enter an order confirming the original judgment by confession. An examination of the points made in the brief and of the arguments of the respective counsel discloses this to be the controlling question in the case and it will therefore not be necessary to discuss other alleged errors assigned and argued.

The affidavit of merits alleges that on April 23, 1927, through the cashier of the plaintiff bank, defendant entered into a transaction wherein it was represented to defendant by the agent of the plaintiff bank that if he would purchase thirty shares of the capital stock of the bank and execute his note for the same in the

TOLEDO STATE BANK,
a corporation,
Appellant,

vs.

GILBERT E. SMITH,
Appellee.

APPEAL FROM SHELBY DISTRICT
OF MILAN.

Filed June 14, 1919.

No. 1.

REVERSED AND REMANDED WITH
INSTRUCTIONS TO ENTER JUDGMENT.

On February 4, 1918, plaintiff bank recovered a judgment in the sum of $2082.70 against defendant upon the preliminary motion. On motion of defendant supported by an affidavit the judgment was opened up, and it was ordered that the affiants stand as an affidavit of merits. The cause was submitted to a jury, and at the close of all the evidence plaintiff moved for an instructed verdict in its favor, which was denied. The jury returned a verdict for defendant upon which the court, overruling motions for a new trial and in arrest, entered judgment.

It is contended by plaintiff that the court erred in refusing the instruction wherein the facts in the authority of Merchants National Bank v. Tomlinson, 91 Ill. 146, the judgment should be reversed here with directions to enter an order confirming the original judgment by default. An examination of the points made in the brief and of the arguments of the respective counsel discloses this to be the controlling question in the case and it will therefore not be necessary to discuss other alleged errors mentioned and argued.

The affidavit of merits alleges that on April 25, 1917, through the counsel of the plaintiff bank, defendant entered into a transaction wherein it was represented to defendant by the agent of the plaintiff bank that if he would purchase thirty shares of the capital stock of the bank and execute his note for the same in the

sum of $4171.50, payable six months after date, he would not be obliged to pay the note or accept the stock except at his own option and election; that plaintiff would redeliver to defendant his note or any notes given in renewal thereof, and that no liability of any kind would attach; that the reason for granting these exceptional terms was defendant's standing in the community and the desire that he might "lend prestige, dignity and standing to the plaintiff banking corporation." In fine, the affidavit states that the real agreement was an option to purchase stock at defendant's election rather than a contract to actually do so. It further states that "at no time would any effort be made to require the defendant to pay the said note and that the note was executed as aforesaid only for the purpose of keeping straight the records of the plaintiff in regard to this transaction."

As a further defense the affidavit avers:

> "No certificates of stock of any kind or nature were ever delivered to defendant; he never received any dividends on said stock and he never received any notice of annual meetings of stockholders or meetings at any other time. Thereafter, relying upon the said promises and agreements of plaintiff, defendant did in fact execute certain notes and the renewal of said notes aforesaid, which said renewal notes are the ones upon which this suit is predicated *** that both of said notes were simply in renewal of said note of defendant first mentioned, together with interest thereon and were made *** upon its (plaintiff's) said representations and agreement."

In other words, the second defense which the affidavit seeks to interpose is that there was lack of failure of consideration for the notes.

Upon the trial defendant offered testimony in his behalf tending to show that at the time of the original transaction on April 23, 1927, at the Triangle State Bank, the real contract was one by which defendant took an option to purchase thirty shares of bank stock at his election, but all this evidence, upon objection by plaintiff, was excluded by the court upon the theory that it was not admissible as tending to establish a parol agreement

sum of $412.50, payable six months after date, he would not be obliged to pay the note or accept the stock except at his own option and election; that plaintiff would relatively to defendant's note or any notes given in renewal thereof, and that he liability of any kind would attach; that the reason for granting these exceptional terms was defendant's standing in the community and the desire that he might "land prestige, dignity and standing to the plaintiff banking corporation." In fact, the affidavit states that the real agreement was an option to purchase stock at defendant's discretion rather than a contract to actually do so. It further states that "at no time would any effort be made to require the defendant to pay the said note and that the note was executed as aforesaid only for the purpose of keeping straight the records of the plaintiff in regard to this transaction."

As a further defense the affidavit avers:

"The certificates of stock of any kind or nature were ever delivered to defendant; he never received any dividends on said stock nor did he ever receive any notice of annual meetings of stockholders or meetings at any other time. Throughout, relying upon the said promises and agreements of plaintiff, defendant did in fact execute certain notes and the renewal of said notes aforesaid, which said renewal notes are the same upon which this suit is predicated --- that both of said notes were simply in renewal of said note of defendant first mentioned, together with interest thereon and were made --- upon the (plaintiff's) said representations and agreement."

In other words, the second defense which the affidavit sets forth interposes the fact there was lack of failure of consideration for the notes.

Upon the trial defendant offered testimony in his behalf tending to show that at the time of the original transaction on April 27, 1927, at the Citizens State Bank, the real contract was one by which defendant took an option to purchase thirty shares of bank stock at his election, but all this evidence, upon objection by plaintiff, was excluded by the court upon the theory that it was not admissible on tending to establish a parol agreement

not to pay the notes, which would vary the terms of the notes themselves. Such is the well established rule to which plaintiff cites numerous authorities. Mager v. Hutchinson, 7 Ill. (2 Gil.) 266; Miller v. Wells, 46 Ill. 46; Weaver, Admr. v. Fries, 85 Ill. 356; Hynes v. Griffin, Admr., 89 Ill. 134; Westbrook v. Howell, 34 Ill. App. 571; Clinton v. Royal, 203 Ill. App. 248; Niblack v. Frank, 209 Ill. App. 162; Farmers State Bank & Trust Co. v. Parr, 234 Ill. App. 78; Tegtmeyer v. Lordlund, 259 Ill. App. 247. The distinction between parol evidence tending to contradict the instrument itself and parol evidence tending to show that a written instrument was never in fact delivered, is pointed out in a number of cases cited in the briefs. Penny v. Graves, 12 Ill. 286; Foy v. Blackstone, 31 Ill. 538; Schultz v. Meyer, 181 Ill. App. 335; Hesch v. Dennis, 194 Ill. App. 663; Handley v. Drum, 237 Ill. App. 587. See also the note to Vincent v. Russell, 20 A. L. R. 421. Defendant does not undertake to distinguish these cases and does not assign any cross-errors upon the rulings of the court in excluding the offered evidence.

Defendant argues in this court that there was a complete failure of consideration for the notes executed by him; that there was evidence sufficient to go to the jury upon that issue, and that the verdict of the jury should not be disturbed. In his argument, however, upon this point, defendant relies upon the facts appearing in evidence offered by him but excluded by the court, and in the absence of cross-errors he may not be permitted to do this. The affidavit of merits hardly discloses allegations sufficient to constitute the defense of failure of consideration. It alleges as facts that no certificates of stock of any kind or nature were ever delivered to defendant; that he never received any dividends on the stock, and that he never received any notice of the annual meetings of stockholders or other meetings at other times. Defendant gave

not to pay the notes, which would vary the burden of the notes thereafter. Such is the well established rule in which plaintiff cites numerous authorities. Bacon v. Schlumberger, 4 Ill. App. (3 Ill.) 488; Miller v. Kelly, 22 Ill. App. 22; Tower Land v. Cross, 22 Ill. App. 488; Byrne v. Griffin, Adm., 22 Ill. App. 492; Gardner v. Ewell, 22 Ill. App. 271; Gilmore v. Carr, 22 Ill. App. 498; Gilmore v. Cross, 22 Ill. App. 501; Kenney Co. v. Ford, 244 Ill. App. 143; Ashley v. Ashley, 204 Ill. App. 603; Gardner v. Ewell, 87 Ill. App. 607. See also the note to Vincent v. Garrett, 30 A. L. R. 421. Defendant does not undertake to distinguish these cases and does not assign any error-error upon the validity of the court in excluding the offered evidence.

Defendant argues in this court that there was a complete failure of consideration for the notes executed by him; that there was evidence sufficient to go to the jury upon that issue, and that the verdict of the jury should not be disturbed. In his argument, however, upon this point, defendant relies upon the facts appearing in evidence offered by him but excluded by the court, and in the absence of cross-errors he may not be permitted to do this. The efficacy of merits hardly discussed allegations sufficient to constitute the defense of failure of consideration. It alleges as facts that no certificates of stock of any kind or nature were ever delivered to defendant; that he never received any dividends on the stock, and that he never received any notice of the annual meetings of stockholders or other meetings at other times. Defendant gave

evidence tending to show these facts and also that the bank stock purchased by him did not stand in the name of the bank but in the name of a third person. The theory of the defense seems to be that the defense was established by proof that defendant did not receive the certificates of stock, notices of stockholders' meetings, dividends, etc.

The uncontradicted evidence shows that at the time of the original transaction defendant signed a receipt form in blank in a stock transfer book; that the stock was transferred to his name on the books of the corporation, and that defendant gave his note for the purchase price of the stock and deposited the stock with the plaintiff bank as collateral to secure the payment of the note. The transfer of the stock upon the books of the bank and the exercise by defendant of the rights of a stockholder amounted to a transfer of the stock to him, although he did not receive the certificates. The delivery of the certificates was not essential to the transfer of the ownership of the stock. Chicago Title & Trust Co. v. Ward, 332 Ill. 126; Colton v. Williams, 65 Ill. App. 466; Allen v. Williams, 212 Ill. App. 114; 5 Thompson on Corporations, 3rd ed., sec. 3467, are a few of the many authorities which might be cited to this point. Moreover, since defendant delivered the stock to be held as collateral to his notes, he was clearly not entitled to the certificates nor could he raise the defense of lack or failure of consideration until the note was paid. Crowther v. Bell, 190 Ill. App. 48; Denzer v. McAvoy, 224 Ill. App. 359. The mere proof therefore that defendant did not personally receive the certificates, that he did not receive dividends when, as a matter of fact, there is no proof that any dividends were declared, that he never received any notice of annual meetings of stockholders or of other meetings, comes far short of proving that there was a total failure of consideration or lack of consideration for the execution

evidence tending to show these facts and also that the bank stock purchased by him did not stand in the name of the bank but in the name of a third person. The issue of the defense seems to be that the defense was established by proof that defendant did not receive the certificates of stock, notices of stockholders' meetings, dividends, etc.

The constitutional provision states that at the time of the original transaction defendant signed a receipt for his stock in a stock transfer book; that the stock was transferred to his name on the books of the corporation, and that defendant gave his note for the purchase price of the stock and delivered the stock with the plaintiff bank as collateral to secure the payment of the note. The transfer of the stock upon the books of the bank and the surrender by defendant of the rights of a stockholder amounted to a transfer of the stock to him, although he did not receive the certificate. The delivery of the certificates was not essential to the transfer of the ownership of the stock. (Dickson Title & Trust Co. v. Ware, 329 Ill. 126; Calvin v. Williams, 89 Ill. App. 484; Allen v. Williams, 143 Ill. App. 124; 4 Thompson on Corporations, 2nd ed., sec. 3407, one a few of the many authorities which might be cited to this point. Moreover, since defendant delivered the stock to the bank as collateral to his note, he was clearly not entitled to the certificates nor could he raise the defense of lack of delivery of certificates until the note was paid. (Wrenshall v. Toll, 180 Ill. App. 49; Jones v. Ryder, 224 Ill. App. 248. The same proof shows that defendant did not personally receive the certificates, that he did not receive dividends when, as a matter of fact, there is no proof that any dividends were declared, that he never received any notice of annual meetings of stockholders or of other meetings, some far short of proving that there was a total failure of consideration or lack of consideration for the execution

of the notes.

It should not be forgotten in this connection that the notes recited a consideration, and that in the absence of proof to the contrary, under the provisions of the Negotiable Instrument law, consideration was presumed and that the burden of proof was upon defendant to establish a lack or failure of consideration. A consideration is presumed until the contrary is made to appear. It is true that upon examination of defendant after he had stated that he signed the note and the stock book, he was asked, "What did you receive for the note there, if anything?" and he replied without objection, "I did not receive anything." He was then asked, "Did you receive property of any kind or nature?" to which he replied, also without objection, that he did not. These statements are the mere conclusions of the witness and avail nothing whatsoever since his evidence, as well as all the other evidence in the case as to the actual facts, shows he did receive the property in the stock; that he deposited it as collateral to his own note which has not been paid; that he exercised his rights as a stockholder by executing a proxy authorizing another to attend a meeting, and that the stock was actually transferred to him upon the books of the corporation. Similar replies made to somewhat similar questions by the defendant in American National Bank v. Woolard, 342 Ill. 148, were held by our Supreme court insufficient to justify a jury in reasonably finding in favor of a party holding the affirmative of an issue, and it was there held that a motion to direct a verdict against such party should have been allowed. In that case the Appellate court for the Fourth district reversed the judgment of the Circuit court and remanded the cause with directions to enter a judgment order confirming the original judgment by confession, and the Supreme court affirmed the judgment of the Appellate court.

For the same reason and following that precedent, the

of the notes.

It might not be interesting in this connection that the court treated a questionable, and that in the absence of proof to the contrary, under the provisions of the Kentucky Statutes law, consideration was presumed and that the burden of proof was upon defendant to establish a lack or failure of consideration. A counterclaim is presumed until the contrary is made to appear. It is true that upon establishing of defendant after he had stated that he signed the note and the above proof, he was asked, "What did you receive for the note there, if anything?" and he replied without objection, "I did not receive anything." He was then asked, "Did you receive property, of any kind or nature?" to which he replied, also without objection, that he did not. Some sixty-odd was the sum questioned of the witness and avail nothing whatsoever since his evidence, as well as all the other evidence in the case as to the actual facts, shows he did receive the property in the above; that he deposited it as collateral to his own note which has not been paid; that he exercised his rights as a stockholder by executing a proxy authorizing another to attend a meeting, and that the stock was actually transferred to him upon the books of the corporation. Similar replies made to somewhat similar questions by the defendant in Mullins Guardian, Clark v. Taylor, 247 Ky. 149, were held by our Supreme court insufficient to justify a jury in reasonably finding in favor of a party making the affirmative of an issue, and it was there held that a motion to direct a verdict against such party should have been allowed. In that case the appellate court for the fourth district reversed the judgment of the Circuit court, and remanded the cause with directions to enter a judgment order confirming the original judgment by confession, and the Supreme court affirmed the judgment of the Appellate court.

For the same reason, and following that precedent, the

judgment here will be reversed with a finding of facts and the cause remanded with directions to the Municipal court to enter a judgment order confirming the original judgment by confession that was entered in this case.

REVERSED WITH FINDING OF FACTS AND REMANDED WITH DIRECTIONS.

McSurely, J., concurs.

O'Connor, J.:
I agree with the conclusion but not with all that is said in the opinion.

FINDING OF FACTS.

We find as facts that defendant, Milford F. Henkel, executed and delivered to plaintiff, Triangle State Bank, two promissory notes upon which judgment was confessed in this cause on February 6, 1930; that there is no evidence in the record from which the jury could reasonably find that said notes were given without consideration or that there has been any failure of the consideration for which the same were executed and delivered; that defendant is justly indebted to plaintiff according to the judgment confessed against defendant on February 6, 1930, in the Municipal court of Chicago, and that said judgment so confessed should be confirmed.

judgment here will be reversed with a finding of facts and the cause remanded with directions to the Municipal Court to enter a judgment order sustaining the original judgment by overruling that was entered in this case.

REVERSED WITH MEANING OF FACTS AND REMANDED WITH DIRECTIONS.

McNurlin, J., concurs.

O'Connor, J.:

I agree with the conclusion but not with all that is said in the opinion.

FINDING OF FACTS.

We find as facts that defendant, Milford F. Hunkel, accepted and delivered to plaintiff, Triangle State Bank, the promissory notes upon which judgment was confessed in this cause on February 6, 1930; that there is no evidence in the record from which the jury could reasonably find that said notes were given without consideration or that there has been any failure of the consideration for which the same were executed and delivered; that defendant in justly indebted to plaintiff according to the judgment confessed against defendant on February 6, 1930, in the municipal court of Chicago, and that said judgment so confessed should be affirmed.

34912

WILSON & SCOTT COMPANY,
a Corporation,
Appellant,

vs.

NATIONAL FISCAL CORPORATION,
a Corporation,
(MICHIGAN-OHIO BUILDING CORPORATION,
a Corporation, Garnishee)
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

261 I.A. 643

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On June 5, 1930, plaintiff, Wilson & Scott Company, filed an affidavit for attachment in the Municipal court of Chicago against defendant, National Fiscal Corporation, alleging an indebtedness due from that corporation in the sum of $331 for goods sold and delivered. On the same day a bond was filed and a summons was issued to the bailiff of the Municipal court, which was returned that no property of defendant was found in the city of Chicago on which to levy the writ, and that by order of plaintiff's attorney the writ had been served on the Michigan-Ohio Building Corporation as garnishee. An alias writ afterwards issued and was served on defendant.

On August 7, 1930, judgment was entered against defendant by default and damages assessed at $331. The time for the garnishee, Michigan-Ohio Building Corporation, to answer was then extended ten days. August 21st the garnishee filed its answer in writing, in which it averred that at the time of the service and at all times thereafter it did not have in its possession and control any money, goods, debts, property or choses in action of any kind or description belonging to the National Fiscal Corporation, and that on the date of the service of the writ it was not indebted to said corporation. The answer further averred that on May 16, 1930, the garnishee recovered a judgment against the

WILLIAM A. BOOTH COMPANY,
a Corporation,
Appellant,

vs.

NATIONAL FIRE INSURANCE,
a Corporation,
(MICHIGAN-OHIO BUILDING CORPORATION,
a Corporation, Garnishee)
Appellee.

APPEAL FROM CIRCUIT COURT
DELIVERED THE OPINION OF THE COURT.

On June 6, 1930, plaintiff, William A. Booth Company, filed an affidavit for attachment in the municipal court of Chicago against defendant, National Fire Corporation, alleging an indebtedness due from that corporation in the sum of $431 for goods sold and delivered. On the same day a bond was filed and a summons was issued to the bailiff of the municipal court, which was returned that no property of defendant was found in the city of Chicago on which to levy the writ, and that by order of plaintiff's attorney the writ had been served on the Michigan-Ohio Building Corporation as garnishee. An alias writ of attachment issued and was served on defendant.

On August 7, 1930, judgment was entered against defendant by default and garnishee summoned as said. The time for the garnishee, Michigan-Ohio Building Corporation, to answer was then extended ten days. August 21st the garnishee filed its answer in writing, in which it averred that at the time of the service and at all times thereafter it did not have in its possession and control any money, goods, debts, property or chosen in action of any kind or description belonging to the National Fire Corporation, and that on the date of the service of the writ it was not indebted to said corporation. The answer further averred that on May 12, 1930, the garnishee recovered a judgment against the

National Fiscal Corporation for $5700 and costs, which judgment remained in full force and effect and unsatisfied except for $633.25, which had been received in partial satisfaction of the judgment. The answer was verified by the president of the garnishee company.

Plaintiff contested the answer and the matter was heard by the court, which found the issues for the garnishee, ordered that the garnishee should be discharged and entered judgment against plaintiff in favor of the garnishee for costs. From that judgment plaintiff has prosecuted this appeal to this court.

Plaintiff offered in evidence the record of the cause, entitled "Michigan-Ohio Building Corporation v. National Fiscal Corporation and C. Y. Schaffer." This record shows that on May 16, 1930, Michigan-Ohio Building Corporation confessed a judgment against the National Fiscal Corporation and C. Y. Schaffer under the terms of a written lease for the amount of $5700 and costs; that on May 31, 1930, defendants therein made a motion to vacate said judgment; that on June 4, 1930, Wilson & Scott Company presented to that court its motion supported by an affidavit asking that the court vacate and set aside the judgment obtained by the Michigan-Ohio Building Corporation; that the court found that the affidavit filed in support of said motion and the matter set up therein did not give the court jurisdiction to entertain the motion, and that it was therefore denied.

Plaintiff contends that by virtue of section 88 of the Practice act (see Smith-Hurd's Ill. Rev. Stats. 1929, chap. 110, p. 2187) the power to confess judgment is limited to "a debt <u>bona fide</u> due;" that a court is wholly without jurisdiction to enter a judgment by such confession unless for a debt which meets that description, and cites <u>Baldwin v. Freydendall,</u> 10 Ill. App.106

National Plant Corporation for $170 and costs, which judgment remained in full force and effect and unmodified except for $4213.38, which had been credited in partial satisfaction of the judgment. The answer was verified by the president of the garnishee company.

Plaintiff contested the answer and the matter was heard by the court, which found the issues for the garnishee, ordered that the garnishee should be discharged and entered judgment against plaintiff in favor of the garnishee for costs. From that judgment plaintiff has prosecuted this appeal to this court.

Plaintiff relies in reversing the record of the lower court, entitled "Michigan-Ohio Building Corporation v. National Plant Corporation and E. T. Shelton." This record shows that on May 24, 1930, Michigan-Ohio Building Corporation secured a judgment against the National Plant Corporation and E. T. Dunfrey under the terms of a written lease for the amount of $3700 and costs; that on May 23, 1930, defendants filed a motion to vacate said judgment; that on June 1, 1930, filing a bond required pertained to that court its motion supported by an affidavit making that the court vacate and set aside the judgment obtained by the Michigan-Ohio Building Corporation; that the court found that the affiant filed in support of said motion was the matter set up therein did not give the court jurisdiction to entertain the motion, and that it was wanderer denied.

Plaintiff contends that by virtue of section 38 of the Practice act (see Smith-Hurd's Ill. Rev. Stat. 1939, chap. 110, p. 2417) the power to continue judgment is limited to "a defendant who fails due;" that a court is wholly without jurisdiction to enter a judgment by non-conformation unless for a debt which accrue that description, and cites Jackson v. Jackson, 16 Ill. App. 104 and other cases to the effect that a court in wholly without jurisdiction to enter a judgment by non-conformation unless for a debt which accrue

affirmed 103 Ill. 325, and Little v. Dyer, 138 Ill. 272, as so holding. It is pointed out that the power to confess a judgment is one that is strictly construed, and that any departure from the authority conferred will render the confession void, as was held in Chase v. Dana, 44 Ill. 262, and Keen v. Bumn, 286 Ill. 11. It is urged that where the warrant of attorney authorizes the confession of judgment at a future time, the entry of judgment before the expiration of the time designated is premature and without legal authority and the court is without jurisdiction of the person of defendant, for which reasons the judgment and all proceedings under it are absolutely void, and it is pointed out that this court so held in the case of Baering v. Epp, 247 Ill. App. 51, on the authority of White v. Jones, 38 Ill. 160.

Judgment by confession was entered May 16, 1930, and was for money claimed to be due under the terms and provisions of a written lease. Subdivision 3 of paragraph 25 of the lease provided in substance that the lessee constituted and appointed any attorney of any court of record to be his attorney for him "and in his name and stead to enter his appearance in any suits that may be brought in any court in the state of Illinois, at any time when any money is due hereunder for rent or under paragraph 12 or any paragraphs of this lease as aforesaid ***." Paragraph 12, referred to, provided as follows:

> "That the lessee will pay to the lessor at once upon the termination of this lease, in accordance with the provisions hereof, or upon the vacation of said premises by the lessee, a sum of money equal to the entire amount of rent by this lease provided to be paid and at that time remaining unpaid, including double rent as herein provided as the liquidated damages of the lessor, and to confess judgment against the lessee and/or his assignee for the amount or amounts due under this paragraph, and upon making such payment the lessee shall be entitled to receive from the lessor all rents received by the lessor from other tenants on account of said premises during the term originally demised by this lease, provided, however, that the moneys to which the lessee shall so become entitled shall in no event exceed the liquidated damages last aforesaid, with lawful interest thereon."

affirmed 108 111. 904, and Ellis v. Jones, 188 111. 470, so no holding. It is pointed out that the power to confess a judgment is one that is strictly construed, and that any departure from the authority conferred will render the confession void, so was held in Chase v. Ryan, 14 111. 223, and Ryan v. Ryan, 198 111. 11. It is urged that where the warrant of attorney authorizes the confession of judgment at a future time, the entry of judgment before the expiration of the time designated is premature and without legal authority and the court is without jurisdiction of the person of defendant, for which reason the judgment and all proceedings under it are absolutely void, and it is pointed out that this court so held in the case of Bowling v. Ryan, 247 111. supp. 22, on the authority of Ehlin v. Jones, 88 111. 180.

Judgment by confession was entered May 16, 1930, and was for money claimed to be due under the terms and provisions of a written lease. Subdivision 3 of paragraph 22 of the lease provides in substance that the lessor, representative and appointee may attorney of my court of record to be his attorney for him "and in his name and stead to enter his appearance in any suits that may be brought in any court in the state of Illinois, at any time when any money is due hereunder for rent or under paragraph 12 or any paragraphs of this lease or otherwise ---." Paragraph 12, referred to, provided as follows:

"That the lessee will pay to the lessor at such time the termination of this lease, in accordance with the provisions hereof, or upon the violation of said provisions by the lessee, a sum of money equal to the entire amount of rent by this lease provided to be paid and at that time remaining unpaid, including taxes rent as herein provided as the liquidated damages of the lessor, and to entitle lessor against the lessee and/or his assignee for the amount or amounts due under this paragraph, and upon making such payment the lessee shall be entitled to receive from the lessor all rents received by the lessor from other lessees on account of said premises during the term originally provided by this lease, provided, however, that the money to which the lessee shall be become entitled shall in no event exceed the liquidated damages last aforesaid, with lawful interest thereon."

Plaintiff argues that the judgment was entered for rent that was not then due under the terms of the lease; that the lease began April 1, 1930, and ran for 25 months following; that the lessees, National Fiscal Corporation and C. Y. Schaffer, convenanted to pay as rent the sum of $5625 in monthly installments of $225, payable one each on the first day of every calendar month of the term, and that therefore on the day judgment was confessed only two installments had matured. The record, however, shows in that case that the validity of the judgment entered in favor of the Michigan-Ohio Building Corporation was adjudicated upon the petition of plaintiff, and the adjudication having been made contrary to the contention of plaintiff, it cannot again litigate that question in this proceeding. Andersen v. West Chicago St. R.R.Co. 206 Ill. 329; Marie Church v. Trinity Church, 253 Ill. 21; People v. Harrison, 253 Ill. 625; People v. Russell, 283 Ill. 520.

Moreover, paragraph 12 of the lease provided that upon vacation of the premises the lessees would pay to the lessor "a sum of money equal to the entire amount of rent by this lease provided to be paid and that at that time remaining unpaid." The declaration filed at the time judgment was confessed alleged that this entire amount had become due. Moreover, disregarding paragraph 12, at least one month's rent was due under the terms of the lease, so that although it might be held that the amount of the judgment was excessive it could not be held that the court was wholly without jurisdiction to enter the judgment. A judgment for too large an amount is erroneous but it is not necessarily void, as has been held in Adam v. Arnold, 86 Ill. 185, and Havens, etc., v. First National Bank, 162 Ill. 35. Paragraph 14 of the lease gave to the garnishee the right to hold any money or property of the National Fiscal Corporation in its hands as security for the payment of the

Plaintiff argues that the judgment was entered for rent that was not then due under the terms of the lease; that the lease began April 1, 1930, and ran for 99 months following; that the lessees, National Fiscal Corporation and S. V. Schaffer, covenanted to pay as rent the sum of $3525 in monthly instalments of $325, payable one each on the first day of every calendar month of the term, and that therefore on the day judgment was confessed only two instalments had matured. The record, however, shows in that case that the validity of the judgment entered in favor of the Mid-Continental Building Corporation was adjudicated upon the pleadings of plaintiff, and the adjudication having been made contrary to the contention of plaintiff, it cannot again litigate that question in this proceeding. Anderson v. Pere Marquette Ry. 5 N.D. 309 N.W. 494; Earle Owens v. Trailer Owners, 198 Ill. App. 1; Fogle v. Martinez, 305 Ill. App. 1; Fogle v. Bassett, 264 Ill. App.

Moreover, paragraph 18 of the lease provided that upon vacation of the premises the lessees would pay to the lessor "a sum of money equal to the entire amount of rent by this lease provided to be paid and that at that time remaining unpaid." The defendant filed at the time judgment was confessed alleged that this entire amount had become due. However, discontinuing paragraph 17, at least one month's rent was due under the terms of the lease, so that although it might be held that the amount of the judgment was excessive it could not be held that the court was wholly without jurisdiction to enter the judgment. A judgment for too large an amount is erroneous but it is not necessarily void, as has been held in Allen v. Arnold, 88 Ill. App. 1, and Kistler, Ex. v. First National Bank, 182 Ill. App. 38. Paragraph 14 of the lease gave to the permitee the right to hold any money or property of the National Fiscal Corporation in its hands as security for the payment of the

(per letter 4-18-31)

obligation of that corporation, so that even if the judgment in question should be held to be void, the ~~garnishee~~ plaintiff garnisher in this case is nevertheless not entitled to recover and the judgment of the trial court is right on the merits.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

34921

THE STEARNES COMPANY,
a Corporation,
Appellant,

vs.

DR. GEORGE W. FUNCK, C. F. GEIGER, DR. CLYDE R. LANDIS and DR. G. E. MAXWELL,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff has appealed from a judgment for defendants entered upon the verdict of a jury as instructed by the court at the close of all the evidence.

The amended statement of claim filed March 3, 1930, alleges that there is due from defendants $1405.25 principal and $100.31 interest, upon a certain promissory note for $1533, dated December 15, 1928. The note is set up verbatim and states:

> "Payable at the rate of $127.75 per month for 12 consecutive months beginning 1/5/29 after date for value received we promise to pay to the order The Stearnes Co.; Fifteen Hundred Thirty-Three and no/100ths Dollars at their Chicago office, 1333 S. Wabash Ave., with interest at 7% per annum after date until paid."

This note is signed by the Southwest General Hospital, Inc., by George W. Funck, Pres., and J. F. Beireis, Treas. It contains a power of attorney to confess judgment "at any time hereafter." On the back of the note appears the following written guaranty:

> "For value received, we, the undersigned, individually, severally and jointly guarantee the payment of the within note at maturity, and at all times thereafter, hereby waiving presentment and demand for payment, notice of non-payment, protest and notice or protest, and consenting, without notice of any kind, to any extensions of time, made by the holder of the within note."

This guaranty is signed by the defendants.

By an amended affidavit of merits filed March 13, 1930, defendants Maxwell, Landis and Funck averred that the note was taken without consideration; that defendants were coerced in signing it; that they never received any consideration for signing

THE STRONGER COMPANY,
a Corporation,
Appellant,

vs.

[illegible] v. Pond, [illegible]
[illegible], Jr., Clerk, [illegible]
and Jno. F. [illegible],
Appellees.

APPEAL FROM MONTGOMERY COUNTY
[illegible] Division.

No. Practice—Motion Attacking
Delivery the Opinion of the Court.

Finality has upholded from a judgment for defendants entered upon the verdict of a jury as instructed by the court at the close of all the evidence.

The amended statement of claim filed March 3, 1930, alleges that there is due from defendants $14,000.00 principal and $100.00 interest, upon a certain promissory note for $1200, dated December 15, 1924. The note is set up verbatim and states:

> "Payable at the rate of $127.78 per month for 12 consecutive months beginning 1/5/26 after date for value received we promise to pay to the order of Stronger Co.: Fifteen hundred thirty-three and no/100ths Dollars at their Chicago office, 1200 S. Michigan Ave., with interest at 8% per annum after date until paid."

This note is signed by the Southwest General Hospital, Inc., by George W. Munck, Pres., and J. P. Dairels, Treas. It contains a power of attorney to confess judgment "at any time hereafter."

On the back of the note appears the following written guaranty:

> "For value received, we, the undersigned, individually, severally and jointly guarantee the payment of the within note at maturity, and at all times thereafter, hereby waiving presentment and demand for payment, notice of non-payment, protest and notice of protest, and commencing, without notice of any kind, in any accounting of time, suits by the holder of the within note."

This guaranty is signed by the defendants.

By an amended affidavit of merits filed March 12, 1930, defendants Maxwell, Daniels and Munck averred that the note was taken without consideration; that defendants were induced to signing it; that they never received any consideration for signing

the alleged guaranty; that after the contract entered into by plaintiff with the Southwest General Hospital, Inc., was full and complete, plaintiff undertook to repudiate the contract unless defendants signed the note; that this contract was dated October 12, 1928, and was for the sale of certain merchandise to the hospital; that the contract was a conditional sales contract; that plaintiff at all times had the right and opportunity to take the merchandise from the corporation but elected not to do so and treated the matter as a complete sale, and thereby prejudiced the rights of defendants by creating damages which would not have existed had the merchandise been resold by plaintiff. Defendant Geiger filed an amended affidavit of merits which was substantially similar to the one filed by the other defendants.

Upon the trial the note was offered in evidence by plaintiff and was received, and other evidence was given tending to show that in December, 1928, plaintiff sold to the hospital in which the guarantors were interested, certain kitchen equipment as per written contract, which was also offered in evidence; that pursuant to an oral agreement the note was sent by plaintiff to the hospital with a letter explaining that defendants were to sign it as guarantors; that the note was returned duly signed by them and the equipment thereupon delivered. The transaction was therefore not without consideration. The credit extended to the hospital was ample consideration for the signatures of the guarantors. Weger v. Robinson Nash Motor Co., 340 Ill. 81. Also, the note upon its face imports a consideration, and the burden of proof to establish the defense which the guarantors set up was upon them.

Defendants contend in the first place that as the contract of sale between plaintiff and the hospital was conditional, it was the duty of plaintiff upon the default of the hospital in

the alleged guaranty; that after the contract entered into by plaintiff with the Southwest General Hospital, Inc., was full and complete, plaintiff ratified to repudiate the contract solely because alleged the ground; that this contract was dated October 12, 1956, and was for the sale of certain equipment in the hospital; that the contract was a conditional sales contract; that plaintiff at all times had the right and opportunity to take the merchandise from the corporation but elected not to do so and treated the matter as a complete sale, and thereby prejudiced the rights of defendants by creating damages which would not have ensued had the merchandise been repossessed by plaintiff. Defendant Hedges filed an amended affidavit of merits which was substantially similar to the one filed by the other defendants.

Upon the trial the note was offered in evidence by plaintiff and was received, and other evidence was given tending to show that in December, 1956, plaintiff sold to the hospital in which the guarantors were interested, certain kitchen equipment as per written contract, which was also offered in evidence; that pursuant to an oral agreement the note was sent by plaintiff to the hospital with a letter explaining that defendants were to sign it as guarantors; that the note was returned duly signed by them and the equipment thereupon delivered. The transaction was therefore not without consideration. The credit extended to the hospital was ample consideration for the signature of the guarantors. Tuttle v. Robinson Park Motor Co., 140 Ill. App. Also, the note upon its face imports a consideration, and the burden of proof to establish the defense which the guarantors set up was upon them.

Defendants contend in the first place that as the contract of sale between plaintiff and the hospital was conditional, it was the duty of plaintiff upon the default of the hospital in

paying for the goods to retake the property and thus lessen defendants' damages. A large number of authorities is cited to the general rule that plaintiff may not avail himself of his own acts of misconduct to enhance the damages which he may recover (Russell v. Turner, 7 Johnson 188); that a party seeking redress for another's wrong must use due diligence to prevent loss (Marks v. Loomer, 4 Ill. App. 198); that diligence to prevent loss is the duty of one wronged (Graham v. Eisner, 28 Ill. App. 269); that one injured by a breach of contract has the duty to make reasonable exertion to lighten the damage (Ford v. Ill. Refrigerating Co., 40 Ill. App. 222); that one injured by another through violation of the terms of a contract must be reasonably diligent and active to recoup his loss (Hall v. Paine, 224 Mass. 62.)

The rule relied on has no application to a case like this. The reservation of title to the goods sold was for the exclusive benefit of the vendor, and the vendor had an absolute right to waive that benefit provided he saw fit to do so. Shepard v. Mills, 173 Ill. 223; Dayton Scale Co. v. General Market House Co., 248 Ill. App. 279. The rule of law upon which defendants rely in this respect is limited by plaintiff's right of election either to rescind and retake the property or to affirm the sale and sue for the purchase price. Smith v. Barber, 153 Ind. 322; Tanned & DeLaney Engine Co. v. Hall, 89 Ala. 628.

Defendants say that no credit was extended because of the alleged guaranty; that the guarantors signed because plaintiff agreed to give title to the property to the hospital and not to require the usual chattel mortgage or conditional sales contract. Defendants further say that plaintiff did not give title as agreed but retained the title through a contract for a conditional sale; in other words, plaintiff failed to deliver the very thing agreed upon as the consideration for the guaranty.

paying for the goods to retake the property and thus lessen defendants' damages. A large number of authorities is cited to the general rule that plaintiff may not avail himself of his own acts of misconduct thereunder the damages which he may recover (Burnell v. Parker, 7 Johnson 268); that a party seeking redress for another's wrong must use due diligence to prevent loss (Burns v. Lamar, 4 Ill. App. 109); that diligence to prevent loss is the duty of one wronged (Uzzell v. Simmer, 88 Ill. App. 309); that one injured by a breach of contract has the duty to make reasonable exertion to lessen the damage (Pick v. Ill. Manufacturing Co., 4 Ill. App. 348); that one injured by another wrongful violation of the terms of a contract must be reasonably diligent and active to recoup his loss (Hall v. Paine, 204 Mass. 62.)

The rule relied on has no application to a case like this. The reservation of title in the goods sold was for the exclusive benefit of the vendor, and the vendor had an absolute right to waive that benefit provided he saw fit to do so. Sherry v. Hills, 173 Ill. 238; Boyton Bangs Co. v. Chicago Safety Lamp Co., 248 Ill. App. 279. The rule of law upon which defendants rely in this respect is limited by plaintiff's right of election either to rescind and retake the property or to affirm the sale and sue for the purchase price. Smith v. Shafer, 184 Ind. 324; Lumber & Supply Co. v. Hall, 99 Ala. 629.

Defendants say that no credit was extended because of the alleged warranty; that the guarantors signed because plaintiff agreed to give title to the property to the husband and not to require the usual chattel mortgage or conditional sales contract. Defendants further say that plaintiff did not give title as agreed but retained the title through a contract for a conditional sale; in other words, plaintiff failed to deliver the very thing agreed upon as the consideration for the warranty.

There are several answers to this contention. In the first place, the mere failure of the payee of a note to keep the promise which was the consideration moving to the maker, does not amount to a failure of consideration as against the guarantor of the note. Gage v. Lewis, 68 Ill. 604; Newton v. Clarke, 138 Ill. App. 196; Western Pine Lumber Co. v. Nelson, 180 Ill. App. 41. In the next place, the defense of failure of consideration was not set up in the affidavit of merits and under the practice in the Municipal court must be regarded as waived. Cooper v. Anderson, 246 Ill. App. 1.

For the same reason as last above stated, defendants cannot maintain another defense which is apparently urged in this court for the first time - that the debt had not matured at the time suit was started. There is no doubt of the general rule that in a suit at law the cause of action must exist at the time the suit is begun, but the contract between the parties provided that on default in the payment of one installment the whole indebtedness might be declared due; and since the affidavit of merits did not set up this defense specifically it will be presumed that the whole debt had been declared due pursuant to that provision of the contract.

The law and the facts being as heretofore stated, it is apparent that not only did the court err in directing the jury to return a verdict for defendants upon the facts, but, on the contrary, as a matter of fact and of law, plaintiff is entitled to recover from defendants on the guaranty for the amount of its claim.

For the reasons indicated the judgment is reversed with a finding of facts and judgment here against defendants and in favor of plaintiff for the amount of plaintiff's claim.

REVERSED WITH A FINDING OF FACTS AND JUDGMENT HERE AGAINST DEFENDANTS AND IN FAVOR OF PLAINTIFF.

O'Connor and McSurely, JJ., concur.

There are several answers to this contention. In the first place, the main failure of the power of a judge is keep the jurors which are the consideration. Having in the mind, does not amount to a failure of consideration, as against the government of the state. Cure v. Lewis, 21 III. 602; Larkin v. Fowler, 122 III. 544, 548; Chicago City & Suburb Co. v. Gibson, 138 III. App. 11. In the case plaintiff, the defendant of judgment of consideration was not set up in the affidavit of merits and under the practice in the Municipal court must be treated as waived. Fuller v. Hughes, 246 III. App. 1.

But the good reason as last above stated, defendants counsel maintain another defense which is apparently urged in this court for the first time - that the note had not matured at the time suit was started. There is no doubt of the general rule that in a suit at law the cause of action must exist at the time the suit is begun, but the contract between the parties provided that on default in the payment of any installment the whole indebtedness might be declared due; and since the affidavit of merits did not set up this defense specifically it will be presumed that the whole debt had been declared due in the provision of the note.

The law and the facts being as hereinbefore stated, it is apparent that not only did the court err in directing the jury to return a verdict for defendants upon the facts, but, on the contrary, as a matter of fact and of law, plaintiff is entitled to recover from defendants on the guaranty for the amount of its claim.

For the reasons indicated the judgment is reversed with a finding of fact and judgment here against defendants and in favor of plaintiff for the amount of plaintiff's claim.

REVERSED WITH A FINDING OF FACTS AND JUDGMENT.

Some dissent memorandum was in favor of plaintiff.

O'Connor and Sullivan, JJ., concur.

34921 FINDING OF FACTS.

We find as facts that under the evidence in this case there is due from defendants, Dr. George W. Funck, C. F. Geiger, Dr. Clyde R. Landis and Dr. G. M. Maxwell, the sum of $1468.38, with interest thereon at the rate of 7% per annum from the 25th day of November, A. D. 1930, to the 6th day of April, A. D. 1931, amounting to $37.40, making a total sum of $1505.78, for which plaintiff is entitled to judgment in this court against said defendants.

ORDER — **:DECISION OF COURT.**

It that we find under the evidence in this case that Essex is due from defendants, Mr. Dwight F. Davis, C. F. Adams, Mr. Clyde R. Lincoln and Mr. W. C. Sawyerll, the sum of $1,[illegible], with interest thereon at the rate of 6% per annum from the 21st day of September, A. D. 1930, to the 4th day of April, A. D. 1932, amounting to $[illegible], leaving a total sum of $[illegible], for which plaintiff is entitled to judgment in this court against said defendants.

34924

JOHN ROLAND,
Appellant,

vs.

WILLIAM RAMSEY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

261 I.A. 644

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained possession of an automobile truck from defendant under a replevin writ, but upon trial by the court suffered an adverse judgment and the truck was ordered returned to the defendant. Plaintiff appeals.

The evidence shows without contradiction that at one time the truck belonged to Harry R. Young, who sold it to his mother-in-law, Lula E. Minor; after she bought it she loaned it to her son-in-law, Young, to use; it was subsequently conveyed by Mrs. Minor and her husband to the plaintiff, John Roland. The bill of sale to plaintiff was introduced in evidence. A certified copy of the bill of sale from Young to Mrs. Minor was also offered, but the court sustained an objection to it. The absence of the original was accounted for and the certified copy was competent evidence and should have been admitted.

Plaintiff testified that he did not get physical possession of the truck when he received the bill of sale, and the court thereupon announced its opinion that plaintiff, having failed to get possession at the time of the sale, could not maintain the action in replevin and upon this basis found against him.

Physical delivery of a chattel sold is not necessary to pass title as between the parties to the sale. Wade v. Moffett, 21 Ill. 110; Barrow v. Window, 71 Ill. 214; Barker v. Bushnell, 75 Ill. 220; Webster v. Granger, 78 Ill. 230. The bills of sale made out a prima facie case of ownership in the plaintiff and he was entitled to

[illegible]

[illegible] MILLER,

Appellant,

vs.

WILLIAM BAKER,

Respondent.

APPEAL FROM SHELBYVILLE COURT

OF CHANCERY.

[illegible]

[illegible] Judge Lewis delivered the opinion of the court.

Plaintiff obtained possession of an unmerchantable truck from defendant under a replevin writ, but upon trial by the court sustained an adverse judgment and the truck was ordered returned to the defendant. Plaintiff appeals.

The evidence shows without contradiction that at one time the truck belonged to Henry A. Young, who sold it to his mother-in-law, Julia A. Miner; after her death it was learned it to her son-in-law, Young, to see; it was subsequently conveyed by Mrs. Miner and her husband to the plaintiff, John Holland. The bill of sale to plaintiff was introduced in evidence. A certified copy of the bill of sale from Young to Mrs. Miner was also offered, but the court sustained an objection to it. The absence of the original was accounted for and the certified copy was competent evidence and should have been admitted.

Plaintiff contended that he did not get physical possession of the truck when he received the bill of sale, and the court thereupon announced its opinion that plaintiff, having failed to get possession at the time of the sale, could not maintain the action in replevin and upon this basis found against him.

Physical delivery of a chattel sold is not necessary to pass title as between the parties to the sale. Wade v. Moffett, 23 Ill. 110; Barlow v. Tilden, 73 Ill. 444; Barker v. Bucknell, 75 Ill. 280; Webster v. Gruner, 73 Ill. 230. The bills of sale made out a prima facie case of ownership in the plaintiff and he was entitled to

the possession of the truck. Under the statute he could maintain the action. Section 1, chapter 119, "Replevin."

Defendant makes the point in support of the judgment that there was no evidence as to the character of defendant's possession, and the rule is that where a party obtains possession lawfully an action of replevin cannot be maintained until a demand has been made and possession refused. No demand was made prior to issuing the writ. Demand, however, is not necessary where the taking is unlawful or where demand would be unavailing. C. R. I. & P. R. R. Co. v. North American C. S. Co., 244 Ill. App. 531. The record before us is silent as to the possession of defendant, except as shown by the return on the writ. A witness was asked to explain the possession of the defendant, but the court sustained an objection to this question. The witness should have been allowed to answer. If it could be shown that defendant did not lawfully come into possession or that a demand for the return of the truck would be useless, it would be unnecessary to make any demand before the issuance of the writ. Testimony should be received on this point.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

the possession of the truck. Under the statute he could maintain the action. Section 1, chapter 110, "Statutes."

Defendant makes the point in support of the judgment that there was no evidence as to the character of defendant's possession, and the rule is that where a party obtains possession lawfully an action of replevin cannot be maintained until a demand has been made and possession refused. No demand was made prior to issuing the writ. Demand, however, is not necessary where the taking is unlawful or where demand would be unavailing. C. N. R. v. T. T. Co. v. Brill Brothers C. E. Co., 244 Ill. App. 611. The record before us is silent as to the possession of defendant, except as shown by the return on the writ. A witness was asked to explain the possession of the defendant, but the court sustained an objection to this question. The witness should have been allowed to answer. If it could be shown that defendant did not lawfully come into possession or that a demand for the return of the truck would be useless, it would be unnecessary to make any demand before the issuance of the writ. Testimony should be received on this point.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

34345

GEORGE F. STEGER

vs.

CHRIS G. STEGER et al.

CHRISTINA MROUNTOS et al.,
Intervening Petitioners,
Plaintiffs in Error,

vs.

GEORGE F. STEGER et al.,
Defendants in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

261 I.A. 644

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error Christina Mrountos, Gust Spirrison, William Dadas, John Dadas and Peter A. Contes, intervening petitioners, seek to reverse a decree of the Circuit court of Cook county sustaining a demurrer to their intervening petition and dismissing it for want of equity at their costs.

The record discloses that on June 6, 1922, the Chicago Title and Trust Company, as conservator of the estate of George F. Steger, insane, filed its bill to construe Article 20 of the last will and testament of John V. Steger, deceased, on the ground that it was ambiguous and uncertain in its meaning. Afterwards the bill was amended so as to specify, with more particularity, the alleged uncertainty of Article 20 of the will. None of the intervening petitioners was made parties to the suit, but the defendants to the bill demurred.

Little was done towards the prosecution of the suit until April 8, 1929, when counsel filed a motion on behalf of George F. Steger, setting up that by an order of the Circuit court of Cook county he had been restored to his reason and to all his rights and privileges enjoyed by him previous to the time when he was adjudged insane, and moved the court that he be substituted as complainant

GEORGE M. STROUD

vs.

CHARLES G. STROUD et al.

CONSOLIDATED PROCEEDING as al.,
Intervening Petitioners,
Plaintiffs in Error,

vs.

GEORGE F. STROUD et al.,
Defendants in Error.

MOTION TO DISMISS WRIT OF
ERROR.

COOK COUNTY.

20 I.A. 644

MR. JUSTICE SCHAEFER DELIVERED THE OPINION OF THE COURT.

By this writ of error Christine Kremmler, Guss Spiridon, William Tuke, Ivan Tuke and Peter L. Cantes, intervening petitioners, seek to reverse a decree of the Circuit court of Cook county sustaining a demurrer to their intervening petition and dismissing it for want of equity at their costs.

The record discloses that on June 1, 1921, the Chicago Title and Trust Company, as conservator of the estate of George F. Stroud, insane, filed its bill to construe Article 30 of the last will and testament of John V. Stroud, deceased, on the ground that it was ambiguous and uncertain in its meaning. Afterwards the bill was amended so as to specify, with more particularity, the alleged uncertainty of Article 30 of the will. None of the intervening petitioners was made parties to the suit, but the defendants to the bill demurred.

Little was done towards the prosecution of the suit until April 6, 1929, when counsel filed a motion on behalf of George F. Stroud, setting up that by an order of the Circuit court of Cook county he had been restored to his reason and to all his rights and privileges enjoyed by him previous to the time when he was adjudged insane, and moved the court that he be substituted as complainant

in lieu of the Chicago Title and Trust Company as his conservator, and he further moved the court that the suit be dismissed. At that time counsel for the intervening petitioners, who had not yet intervened and were not parties to the suit, advised the court that he represented several persons whose claims had been allowed against the estate of George F. Steger by the Probate court of Cook county, where the estate was being administered, and that there was no estate in the hands of the conservator, the Chicago Title and Trust Company, with which to pay the claims, and objected to the granting of either of the motions. He further stated to the court that he intended to present and file an intervening petition in the nature of a cross-bill on behalf of the creditors of George F. Steger, whose claims had been allowed by the Probate court, to the end that such claims be paid out of any property coming to George F. Steger under the will of his father, John V. Steger, deceased, and asked leave to file such intervening petition. The court refused to pass upon the motions but postponed a consideration of them to May 1, 1929. Afterwards, on April 11th, George F. Steger filed his written motion that he be substituted as complainant and that the suit be dismissed.

On May 3, 1929, the motions came on to be heard, and on that date three orders were entered. By the first it was ordered that George F. Steger be substituted as complainant in lieu of the Chicago Title and Trust Company as his conservator. The second order recites the coming on to be heard of the motion of George F. Steger to dismiss the suit and that the motion was denied and overruled. The third order recites the motion of the parties who sought to intervene; and it was ordered that leave be given them to become defendants to the suit and to file their intervening petition in the nature of a cross-bill. It was further ordered that the cross-defendants plead, answer or demur within 30 days and that summons issue for certain other cross-defendants. Apparently the intervening

in lieu of the Chicago Title and Trust Company as his conservator, and he further moved the court that the suit be dismissed. At that time counsel for the intervening petitioners, who had not yet intervened and were not parties to the suit, advised the court that he represented several persons whose claims had been allowed against the estate of George V. Steger by the probate court of Cook county, where the estate was being administered, and that there was no estate in the hands of the conservator, the Chicago Title and Trust Company, with which to pay the claims, and objected to the granting of either of the motions. He further stated to the court that he intended to present and file an intervening petition in the nature of a cross-bill on behalf of the creditors of George V. Steger, whose claims had been allowed by the probate court, to the end that such claims be held not a lien upon property owned by George V. Steger under the will of his father, John V. Steger, deceased, and asked leave to file such intervening petition. The court refused to pass upon the motions but permitted a continuance of them to May 3, 1938. Afterwards, on April 11th, George V. Steger filed his written motion that he be substituted as complainant and that the suit be dismissed.

On May 3, 1938, the motions came on to be heard, and on that date their orders were entered. By the first it was ordered that George V. Steger be substituted as complainant in lieu of the Chicago Title and Trust Company as his conservator. The second order recites the coming on to be heard of the motion of George V. Steger to dismiss the suit and that the motion was denied and overruled. The third order recites the motion of the parties who sought to intervene; and it was ordered that leave be given them to become defendants to the suit and to file their intervening petition in the nature of a cross-bill. It was further ordered that the cross-bill defendants plead, answer or demur within 30 days and that summons issue for certain other cross-defendants. Apparently the intervening

petition was filed on this day, although it does not appear in the record. June 3, 1929, the intervening petitioners filed their answer to the bill of complaint. Afterwards the cross-defendants demurred to the intervening petition. The demurrer was confessed and the intervenors given leave to file an amended petition, which they did on October 11, 1930. The cross-defendants again demurred to the amended petition, and on October 31, 1930, the demurrers to the amended intervening petition were sustained; the intervenors elected to stand by their intervening petition and it was dismissed for want of equity. The decree then recites that the demurrers to the amended and supplemental bill came on for hearing; that complainant confessed the demurrers, and the suit was dismissed for want of equity at complainant's costs and the intervenors prayed and were allowed an appeal. It is to reverse this decree that the intervenors prosecute this writ of error.

The substance of the allegations of the amended intervening petition is that on December 27, 1920, Chris G. Steger filed a petition in the Probate court of Cook county to have his brother George F. Steger, the complainant, adjudged to be an insane person, and that he was so adjudged by the Probate court; that on January 28, 1921, the Chicago Title and Trust Company was appointed conservator; that it qualified and continued to act in that capacity until April 2, 1929, when proceedings were had in the Circuit court of Cook county upon appeal from the Probate court, whereby an order was entered that he had been restored to reason and stating that he was capable of managing his estate and the conservator was discharged from further control, and it was directed to file its final report in the Probate court of Cook county. That more than forty years ago John V. Steger had established the business of manufacturing and selling pianos and continued in that business until his death June

petition was filed on this day, although it does not appear in the record. June 8, 1938, the intervening petitioners filed their answer to the bill of complaint. Alternately the cross-defendants demurred to the intervening petition. The demurrer was sustained and the intervenors given leave to file an amended petition, which they did on October 11, 1938. The cross-defendants again demurred to the amended petition, and on October 21, 1938, the demurrer to the amended intervening petition were sustained; the intervenors elected to stand by their intervening petition and it was dismissed for want of equity. The decree then recites that the demurrer to the amended and supplemental bill came on for hearing; that complainant withdrew the demurrer, and the suit was dismissed for want of equity at complainant's costs and the intervenors stood and were allowed an appeal. It is to reverse this decree that the intervenors prosecute this writ of error.

The substance of the allegations of the amended intervening petition is that on December 27, 1920, Harris G. Steger filed a petition in the Probate court of Cook county to have his brother George K. Steger, the complainant, adjudged to be an insane person, and that he was so adjudged by the probate court; that on January 24, 1921, the Chicago Title and Trust Company was appointed guardian; that it qualified and continued to act in that capacity until April 2, 1932, when proceedings were had in the Circuit court of Cook county upon appeal from the Probate court, whereby an order was entered that he had been restored to reason and stating that he was capable of managing his estate and the guardianship was discharged from further control, and it was directed to file its final report in the Probate court of Cook county. Just more than forty years ago John V. Steger had established the business of manufacturing and selling plumes and continued in that business until his death June

11, 1916; that his company was incorporated but that he remained in control. The petition then sets up the large growth of the piano business and that for a period of about twenty years the Stegers, who controlled the business adopted a course of dealing with their employees, some of whom are the intervenors, whereby the employees would deposit with the Stegers part of their earnings for safe-keeping; that in 1920 these deposits aggregated more than two million dollars; that those employees who made such deposits were favored in employment and promotion; that at the time of the death of John V. Steger in 1916, he held title to real and personal property of the value of about six million dollars; that two million dollars of this was the money deposited by the employees; that John V. Steger left a last will and testament, admitted to be probated in the Probate court of Cook county, whereby he disposed of all of his real estate except a few minor legacies in trust for the benefit of his widow and his sons and daughters, and that by the will Chris G. Steger, George F. Steger and other parties were named as trustees. The petition then sets up Article 20 of John V. Steger's will (the construction of which was the sole object of the bill of complaint), and it is then alleged that Article 20 was void and therefore the beneficial interests of the trust estate were devised and bequeathed to George F. Steger, Chris G. Steger and other parties, and that George F. and Chris G. Steger each became vested in an undivided one-half interest to the residuary estate of John V. Steger, deceased.

It was further alleged that "in or before the year 1920, Chris G. Steger and George F. Steger" entered into a conspiracy to defraud the employees of the Piano company out of their money which they had deposited as above stated, and that the deposits made by the employees and the receipts for such deposits had been conducted solely by George F. Steger in his individual

11, 1910; that his company was incorporated for that he invested in
security. The position each held in the large growth of the plant
business and that for a period of about twenty years the Stegers,
was constantly the business adopted a course of dealing with their
employees, some of whom are the interveners, namely the majority
would deposit with the Stegers part of their earnings for safe-
keeping; that in 1920 these deposits aggregated more than two mil-
lion dollars; that these employees who made such deposits were
favored in employment and promotion; that at the time of the death
of John V. Steger in 1918, he had little in real and personal prop-
erty of the value of about six million dollars; that two million
dollars of this was the money deposited by the employees; that John
V. Steger left a last will and testament, admitted to be probated
in the Probate court of Cook county, whereby he disposed of all of
his real estate except a few minor legacies in trust for the benefit
of his widow and his sons and daughters, and that by the will Otto
E. Steger, George F. Steger and other parties were named as trustees.
The petition then sets up article 30 of John V. Steger's will (the
construction of which was the sole object of the bill of complaint),
and it is then alleged that article 30 was void and therefore the
beneficial interests of the trust estate were devised and bequeathed
to George F. Steger, Otto E. Steger and other parties, and that
George F. and Otto E. Steger each became vested in an undivided one-
half interest in the residuary estate of John V. Steger, deceased.

It was further alleged that "in or before the year
1920, Otto E. Steger and George F. Steger" entered into a sub-
stitutory to defraud the employees of the Plano company out of their
money which they had deposited as above stated, and that the de-
posits made by the employees and the receipts for such deposits
had been conducted solely by George F. Steger in his individual

capacity, and that he had received and used all of such money personally and without authority from John V. Steger or Chris G. Steger or the Steger company; and that therefore no one was liable but George F. Steger, and that he had been for a long time mentally unsound and irresponsible; that in pursuance of the conspiracy Chris G. Steger filed his petition in the Probate court to have George F. Steger adjudged to be an insane person, although he knew that George was not insane; that after the appointment of the conservator by the Probate court, the conservator, at the request of Chris G. and George F. Steger, caused all persons who had made deposits as aforesaid to file their claims in the Probate court in the conservatorship proceedings, and that claims of nearly one million dollars had been so filed and allowed by the Probate court; that the intervening petitioners' claims were thus allowed: May 25, 1921, Peter A. Contes, $9,000; January 13, 1922, William Dadas and John Dadas, $4,000; July 13, 1922, Christina Hrountos, $10,000; July 13, 1922, Gust Spirrison, $5,000; and that they were still due and unpaid; that the conservator filed its inventory of the estate in the Probate court of Cook county showing divers items of real and personal property, all of which had been disposed of except the interest of George F. Steger under the will of his father, and that the moneys derived from such sale had been all used in the expenses of administration and that the claims were wholly unpaid.

It was further alleged that by reason of the fraud perpetrated by Chris G. and George F. Steger in having the collusive proceeding instituted in the Probate court to have George F. Steger adjudged insane, the intervenors were induced to forego filing any suits at law against George F. Steger, it having been represented to the intervenors that there was sufficient property belonging to George F. Steger in his estate to pay all claims allowed.

capacity, and that he had received and used all of such money personally and without authority from John V. Steger or Curtis G. Steger or the Steger company; and that therefore no one was liable but George F. Steger, and that he had been for a long time mentally weakened and irresponsible; that in pursuance of the conspiracy Curtis G. Steger filed his petition in the Probate court to have George F. Steger adjudged to be an insane person, although he knew that George was not insane; that after the appointment of the conservator by the Probate court, the conservator, at the request of Curtis G. and George F. Steger, caused all persons who had made deposits as aforesaid to file their claims in the Probate court in the conservatorship proceedings, and that claims of nearly one million dollars had been so filed and allowed by the Probate court; that the intervening petitioners' claims were then allowed: May 16, 1921, Peter A. Santos, $8,000; January 17, 1922, William Dunne and John Dunne, $4,000; July 13, 1922, Catalina Stevens, $10,000; July 13, 1922, Dent Spritzman, $3,000; and that they were still due and unpaid; that the conservator filed its inventory of the estate in the Probate court of Cook county showing diverse items of real and personal property, all of which had been disposed of except the interest of George F. Steger under the will of his father, and that the moneys derived from such sale had been all used in the expenses of administration and that the claims were wholly unpaid.

It was further alleged that by reason of the fraud perpetrated by Curtis G. and George F. Steger in having the collusive proceeding instituted in the Probate court to have George F. Steger adjudged insane, the intervenors were induced to forego filing any suits at law against George F. Steger, it having been represented to the intervenors that there was sufficient property belonging to George F. Steger in his estate to pay all claims allowed.

Upon information and belief it was alleged that the intervenors will be unable to reach any equitable interest of George F. Steger to satisfy their claims unless they are allowed to intervene in the instant suit. And it was further alleged upon information and belief that the residuary estate given to the trustees under Article 20 of John V. Steger's will principally consists of 980 shares of stock of the Piano company, real estate and leasehold interests, some of which real estate is subject to the dower rights of the widow of John V. Steger, deceased; that in 1922 the Piano company manufactured about 40 pianos a day, had about 1200 employees and had no funded indebtedness; that it had about one million dollars in banks in Chicago; that for the past four or five years the company ceased to manufacture and sell pianos and was operating merely for the purpose of liquidation; that its financial condition was "extremely desperate;" that the sole purpose of continuing the business was to dispose of its assets which consisted principally of lands, buildings, machinery, equipment,materials, etc.; that the property was rapidly deteriorating; that despite this condition the officers and directors continued to maintain a large office and factory force at great expense - much larger than was necessary; that the trustees of the estate of John V. Steger, deceased, were drawing large and exorbitant salaries; that the assets were being thus dissipated; that no audit of the financial affairs had been made for several years; and that by this omission it was the purpose of Chris G. Steger to fraudulently conceal the expenditures; that if the property of the company was properly liquidated a large part of the expenses would be eliminated and a fund created which would go to George F. Steger so that the intervenors might be paid.

It was further alleged upon information and belief that since George F. Steger was adjudged insane in 1920, the total income paid to him or to his conservator was approximately $14,000,

upon information and belief it was alleged that the intervenors will be unable to prove any pecuniary interest of George F. Steger in matters that claims arises that are alleged to interpose in the instant suit. And it was further alleged upon information and belief that the residuary estate given to the trustees under Article IX of Item V. Steger's will principally consists of two shares of stock of the Flume company. Real estate and leasehold interests, none of which real estate is subject to the dower rights of the widow of John V. Steger, deceased; that in 1929 the Flume company manufactured about 60 pieces a day, had about 1400 employees and had no funded indebtedness; that it had about one million dollars in bank in Chicago; that for the past four or five years the company ceased to manufacture and sell pipes and was executing merely for the purpose of liquidation; that its financial condition was "extremely desperate;" that the sole purpose of continuing the business was to dispose of its assets which consisted principally of lands, buildings, machinery, equipment,materials, etc.; that the property was rapidly deteriorating; that despite this condition the officers and directors continued to maintain a large office and factory force at great expense - much larger than was necessary; that the trustees of the estate of John V. Steger, deceased, were drawing large and exorbitant salaries; that the assets were being dissipated; that no audit of the financial affairs had been made for several years; and that by this omission it was the purpose of Carrie G. Steger to fraudulently conceal the encumbrances; that if the property of the company was properly liquidated a large part of the expenses would be eliminated and a fund created which would go to George F. Steger so that the intervenors might be paid.

It was further alleged upon information and belief that since George F. Steger was adjudged insane in 1924, the total income paid to him or to his conservator was approximately $14,000.

but that his true income was at least $25,000 a year, or a total of not less than $200,000; that in the year 1928 the statute of limitations had apparently run against all of the claims of the employees for moneys deposited as above stated, and when the statute had run, George F. Steger and Chris G. Steger, in pursuance of their conspiracy, caused the order to be entered by the court restoring George and discharging the conservator; that if the parties in charge and control of the business and assets are allowed to continue all of the assets will be dissipated by unnecessary and exorbitant expenses; that the Piano company occupied space in a downtown building belonging to the estate, of the rental value of $28,000 or $30,000 a year, but had paid no rent, and the trustees had made a claim therefor; that further claims are being made by the trustees; that the conservator, while in charge of the estate of George F. Steger, insane, had demanded that the trustees cause the Piano company to vacate the premises occupied by it, but without result; that Chris G. Steger, while acting as trustee under the will of John V. Steger, deceased, had charged large sums of money for fictitious supervision and management of the building, aggregating $60,000; that the estate will continue to be dissipated unless the court takes jurisdiction of the intervening petition and compels an accounting by the trustees and the trustees be removed; that the petition is brought on behalf of the intervenors and all other creditors similarly situated who desire to join.

The prayer of the petition is that the intervenors be awarded "their just and equitable costs and expenses *** including counsel and solicitor fees ***" and "including costs of investigation;" that the cross-defendants answer the intervening petition; that an account be taken; that the trustees and other parties may be decreed to pay to the trust estate such sums as it may appear

but that his trust income was at least $17,000 a year, or a total of not less than $250,000; that in the year 1924 the estate of Elizabeth had apparently run against all of the claims of the employees for money dependent as above stated, and when the estate had run, George F. Steger and Charle G. Steger, in pursuance of their contract, buried the estate in be updated by the court restoring George and disqualifying the conservator; that if the parties in court and heirs of the business and estate are allowed to continue all of the assets will be dissipated by unnecessary and extraordinary expenses; that the Plane company occupied space in a townsen building belonging to the estate, of the rental value of $25,000 or $30,000 a year, but had paid no rent, and the trustees had made a claim therefor; that further claims are being made by the trustees; that the conservator, while in charge of the estate of George F. Steger, insane, had demanded that the trustees cause the Plane company to vacate the premises occupied by it, but without result; that Charle G. Steger, while acting as trustee under the will of John V. Steger, deceased, had charged large sums of money for fictitious supervision and management of the building, aggregating $60,000; that the estate will continue to be dissipated unless the court takes jurisdiction of the intervening petition and compels an accounting by the trustees and the trustees be removed; that the petition is brought on behalf of the intervenors and all other creditors similarly situated who desire to join.

The prayer of the petition is that the intervenors be awarded "their just and equitable costs and expenses --- including counsel and solicitor fees ---" and "including costs of investigation;" that the cross-defendants answer the intervening petition; that an account be taken; that the trustees and other parties may be decreed to pay to the trust estate such sums as it may appear

they have received in excess of their reasonable charges; that a receiver be appointed to take charge of the property of John V. Steger, deceased, and of the Piano company, with power to sell all the assets and that all persons who have received money and who are employed in the conducting of the estate and of the company be decreed to account for and repay all they have wrongfully received; that the court "review the payments made *** for attorneys' fees, detective and other charges," etc.; that the Piano company be decreed to vacate the premises occupied by it in the downtown building; that the trustees be removed and suitable persons appointed in their stead; that the court construe Article 20 of the will of John V. Steger, deceased; that the trustees and other officers and directors be enjoined from making any further expenditures or payments of money without first obtaining leave of court; that they severally submit a detailed and itemized list of assets and income and disbursements received and made by the trustees; that a statement of the assets and liabilities of the Piano company during the trusteeship, be made; that George F. Steger be decreed to pay to the petitioners the amount found due on such accounting, together with the petitioners' costs and charges, "as well as counsel fees, solicitor's fees and investigation and litigation expenses;" that George F. Steger be enjoined from selling or receiving or from meddling in any way with any of his assets, whether held by him or by any other person in trust for him.

Counsel for the complainant contends that the demurrer to the amended intervening petition was properly sustained for three reasons: (1) That the intervenors "have no such interest in the will of John V. Steger as entitles them to maintain an intervening petition to construe that will. (2) That they have no right to maintain the intervening petition as a creditors' bill because they have not exhausted their remedy at law;" and (3) That irrespective

they have received in excess of their reasonable charges; that a receiver be appointed to take charge of the property of John V. Steger, deceased, and of the Plano company, with power to sell all the assets and that all persons who have received money and who are engaged in the execution of the estate and of the company be directed to account for and repay all they have wrongfully received; that the court "seize the property made -- the attorneys' fees, detective and other charges," etc.; that the Plano company be directed to vacate the premises occupied by it in the downtown building; that the trustees be removed and suitable persons appointed in their stead; that the court construe Article 80 of the will of John V. Steger, deceased; that the trustees and other officers and directors be enjoined from making any further expenditures or payments of money without first obtaining leave of court; that they severally submit a detailed and itemized list of assets and income and disbursements received and made by the trustees; that a statement of the assets and liabilities of the Plano company during the trusteeship, be made; that George V. Steger be directed to pay to the petitioners the moneys found due on such accounting, together with the petitioners' costs and charges, "as well as counsel fees, solicitor's fees and investigation and litigation expenses;" that George V. Steger be enjoined from selling or receiving or from meddling in any way with any of his assets, whether held by him or by any other person in trust for him.

Answer for the respondent asserts that the demurrer to the amended intervening petition was properly sustained for three reasons: (1) That the intervenors "have no such interest in the will of John V. Steger as entitles them to maintain an intervening petition in contests that will. (2) That they have no right to maintain the intervening petition as a creditors' bill because they have not exhausted their remedy at law;" and (3) That intervenors

of these two questions, the demurrer to the amended intervening petition was properly sustained because the "amended intervening petition contains no allegations which would entitle the intervenors to any discovery or relief" as against cross-defendants Louisa Rosina Steger, Marie Stella Northen, Anna Nellie Johnson and Estella Henrietta Hinman.

In this state the right to intervene in a suit, not having been made the subject of statutory regulation, is governed by the general rules of equity. Wightman v. Yaryan Co., 217 Ill. 371. In that case there was an appeal from an order dismissing an intervening petition, and the question for decision was whether the intervenors had such an interest in the suit as would entitle them to become parties to it. The court there discusses the rule of law in such cases and said that some states had enacted statutes authorizing intervention under certain facts and circumstances under which persons having an interest might intervene, and said p. 376: "We have no statute extending the rights of parties to intervene except in attachment cases where a stranger to the proceeding claims property attached. In this state, therefore, the right of intervention must be controlled by the general rules in equity as to the answer of the proper parties. 'In equity no one is entitled to be made or become a party to the suit unless he has an interest in its object. But it is the usual practice to permit strangers to the litigation, claiming an interest in the subject matter, to intervene on their own behalf to assert the titles.'*** The rule in the United States courts is, that 'persons who are not parties to a suit having no standing in court to enable them to file a petition in said suit. If they have any occasion to ask any relief in relation to the matters involved in said suit or to the proceedings therein they must file an original bill.*** Strangers to a cause cannot be heard therein, either by petition

of these two questions, the decision to the amended intervening petition was properly based because the "amended intervening petition contains no allegations which would entitle the intervenor to any discovery or relief" as against cross-defendants Benjamin Moskowitz Steyer, Marie Hedlin Moskowitz, Anne Hedlin Johnson and Cornelia Weatherly Johnson.

In this state one right to intervene in a suit, not having been made the subject of statutory regulation, is governed by the general rules of equity. Wickham v. Lawson Co., 87 Ill. 271. In that case there was an appeal from an order dismissing an intervening petition, and the question for decision was whether the intervenors had such an interest in the suit as would entitle them to become parties to it. The court there discussed the rule of law in such cases and said that some states had enacted statutes authorizing intervention under certain fixed and circumstances under which persons having an inferior right intervene, and said p. 278: "We have no statute extending the rights of parties to intervene except in extraordinary cases where a stranger to the proceeding claims property attached. In this state, therefore, the right of intervention must be controlled by the general rules in equity as to the manner of the proper parties. 'In equity no one is entitled to be made or become a party to the suit unless he has an interest in its subject. But it is the usual practice to permit strangers to the litigation, claiming an interest in the subject matter, to intervene on their own behalf to assert the rights.'" The rule in the United States courts is, that 'persons who are not parties to a suit having no standing in court to enable them to file a petition in said suit. If they have any occasion to ask any relief in relation to the matters involved in said suit or to the proceedings therein they must file an original bill.'" Reference is made among the cases therein, either by petition

or motion, except in certain cases arising from necessity, as where the pleadings contained scandal against a stranger, or where the strangers purchase the subject of litigation pending the suit, and the like.'" The court then quotes from Marsh v. Green, 79 Ill. 385, and Shanahan v. Stevens, 139 Ill. 428, and continuing said, p. 377: "From the foregoing text and decisions we understand the rule to be no more or less than that parties having an interest in the subject matter of the suit in equity, and who are either necessary or proper parties to such suit, if not made so by the plaintiff, may come in by way of application to intervene and be made parties."

The court then referred to the general rule permitting parties to intervene in a chancery suit, and said, p. 378: "If we turn to the decisions rendered by the various courts in those jurisdictions in which statutes are in force authorizing intervention, we find that they hold, without exception, that the interest which will entitle a party to intervene must be an interest in the matter about which the litigation is to be, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment, - that is, the interest must be one created by a claim to the demand of property in suit, or some part thereof, or a lien upon the property, or some part thereof, which is the subject matter of litigation."

The court then quoted with approval from a Louisiana case (1 La. Ann. 4725) as follows: "This, we suppose, must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties, otherwise the strange anomaly would be introduced into our jurisprudence of suffering an accumulation of suits in all instances where doubts might be entertained or enter into the imagination of subsequent plaintiffs that the defendant

or motion, except in certain cases arising from necessity, as where the pleadings contained demurrer against a stranger, or where the strangers petitions the subject of litigation pending the suit, and the like.'" The court then quotes from Kemp v. Green, 79 Ill. 585, and Shannon v. Kennedy, 130 Ill. 436; and continuing said, p. 377: "From the foregoing text and decisions we understand the rule to be no more or less than that persons having an interest in the subject matter of the suit in equity, and who are either necessary or proper parties to such suit, if not made so by the plaintiff, may come in by way of application to intervene and be made parties."

The court then referred to the general rule permitting parties to intervene in a chancery suit, and said, p. 378: "If we turn to the decisions rendered by the various courts in these jurisdictions in which statutes are in force concerning intervention, we find that they hold, without exception, that the interest which will entitle a party to intervene must be an interest in the matter about which the litigation is to be, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment, - that is, the interest must be one created by a claim to the demand of property in suit, or some part thereof, or a lien upon the property, or some part thereof, which is the subject matter of litigation."

The court then quoted with approval from a Louisiana case (1 La. Ann. 478) as follows: "This, we suppose, must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties; consequently the remote possibility could be introduced into our jurisprudence of multiplying an accumulation of suits in all instances where doubts might be entertained or enter into the imagination of some busy plaintiffs that the defendant

against whom a previous action was under prosecution might not have property sufficient to discharge all his debts."

And further, the court said, p. 381: "The reason for thus qualifying the right to intervene rests upon the principle that parties to a suit have the right to proceed with it to final judgment or decree free from interference by others, and if parties desire to obstruct the litigation, except as qualified in the foregoing, they must do so by an original action."

In considering this rule the court, in Bossert v. Drainage District, 307 Ill. 425, said, p. 429: "The intervening party must have an interest in the subject matter involved, which may be adversely affected unless he is made a party."

Applying the rule as above announced by our Supreme court to the instant case, we are of the opinion that the demurrer was properly sustained to the intervening petition. The intervenors would not gain or lose by the entry of a decree if one were entered as prayed for in the bill of complaint. That bill asks only that a decree be entered construing Article 20 of the will of John V. Steger, deceased. It has not been pointed out by counsel for the intervenors how the intervenors' interest, if any, would be affected by the construction of Article 20. Complainant, who filed a simple bill for the construction of a part of the will, ought not be compelled to litigate this single issue with matters foreign to the bill.

In the instant case the petitioners not only seek a construction of Article 20 but they also seek to bring into the litigation a great many matters foreign, as will appear from the allegations of the amended intervening petition above referred to. They seek to have an investigation of the Piano company's business covering a period of more than twenty years. They charge a conspiracy in the appointment of the conservator of George F. Steger. They

against whom a structure within the water protection rights act does property sufficient to discharge all his debts."

And further, the court said, p. 843: "The reason for thus qualifying the rights to intervene rests upon the principle that parties in a suit have the right to present when it to final judgment or decree free from interference by others, and if parties desire to obtrude the litigation, except as qualified in the rule-ruling, they must do so by an original action."

In considering this case the court, in Barnett v. Chicago District, 201 Ill. 418, said, p. 424: "The intervening party must have an interest in the subject matter involved, which may be adversely affected unless he is made a party."

Applying the rule as above announced by our Supreme court in the instant case, we are of the opinion that the decree was properly entered to the intervening petition. The intervenors would not gain or lose by the entry of a decree if one were entered as prayed for in the bill of complaint. That bill sets forth that a decree be entered construing Article 20 of the will of John V. Steger, deceased. It has not been pointed out by counsel for the intervenors how the intervenors' interest, if any, would be affected by the construction of Article 20. Complainant, who filed a single bill for the construction of a part of the will, ought not be compelled to litigate this single issue with matters foreign to the bill.

In the instant case the petitioners not only seek a construction of Article 20 but they also seek to bring into the litigation a great many matters foreign, as will appear from the allegations of the amended intervening petition above referred to. They seek to have an investigation of the Plano company's business covering a period of more than twenty years. They charge a conspiracy in the management of the conservator of George V. Steger. They

charge that the business of the Stegers was fraudulently and extravagantly conducted; that large and exorbitant salaries were paid; that the management of the business was extravagantly and fraudulently conducted; they ask that the trustees be removed and others appointed in their stead; they ask for a receiver to take charge of the property, and that their counsel and solicitors' fees be paid.

A mere statement of some of the requests made by the intervenors discloses the fact that the expenses of the litigation which they seek would be enormous and protracted. In these circumstances we think they ought not be permitted to intervene, but should, if they so desire, file an original suit as stated in the Wightman case. We think a great many matters set up in the intervening petition are not germane to the original suit, and therefore the intervening petition was demurrable. Kearney v. Kirkland, 279 Ill. 516.

Counsel for the intervenors in their briefs say that the motion of George F. Steger, the substituted complainant in the bill to dismiss the suit, was made too late because it was after the intervening petitioners had asked leave to file their intervening petition in the nature of a cross-bill. We think this contention is not borne out by the record, as we have above heretofore stated. George F. Steger's motion to dismiss was made before the motion of the intervenors for leave to file their intervening petition. It has been held in this State that the complainant has an absolute right to dismiss his suit at any time unless a cross-bill is filed. Purdy v. Henslee, 97 Ill. 389; Mohler v. Wiltberger, 74 Ill. 163; Paltzer v. Johnston, 213 Ill. 338; Langlois v. Matthiesen, 153 Ill. 230. Whether this matter is properly before us, we do not pass upon, since it has not been argued by counsel for the complainant.

For the reasons stated the decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

charge that the business of the Degnors was fraudulently and extravagantly conducted, that large and excessive salaries were paid, that the management of the business was extravagantly and fraudulently conducted; they ask that the creditors be removed and others appointed in their stead; they ask for a receiver to take charge of the property, and that their costs and solicitors' fees be paid.

A mere statement of some of the requests made by the interveners discloses the fact that the expenses of the litigation which they seek would be burdensome and protracted. In these circumstances we think they ought not be permitted to intervene, but should, if they so desire, file an original suit as stated in the Wightman case. We think a great many matters set up in the intervening petition are not germane to the original suit, and therefore the intervening petition was demurrable. Gaskney v. Lightner, 170 Ill. 354.

Counsel for the interveners in their brief say that the motion of George F. Degner, the subject-matter complained of in the bill to dissolve the suit, was made too late because it was after the intervening petitioners had asked leave to file their intervening petition in the nature of a cross-bill. We think this contention is not borne out by the record, as we have above hereinbefore stated. George F. Degner's motion to dismiss was made before the motion of the intervenors for leave to file their intervening petition. It has been held in this State that the complainant has an absolute right to dismiss his suit at any time unless a cross-bill is filed. Cook v. Sherman, 27 Ill. 424; Bonier v. Kirkpatrick, 76 Ill. 321; Gaskney v. Lightner, 170 Ill. 354; Lumbrick v. Kettlewell, 132 Ill. 324. Whether this matter is properly before us, we do not pass upon, since it has not been argued by counsel for the complainants.

For the reasons stated the decree of the Circuit court of Cook county is affirmed.

Decree affirmed.

34979

JOHNSON SERVICE COMPANY, a Corporation, Appellee,

vs.

PASCHEN BROS., a Corporation, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

261 I.A. 644

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover $2490 claimed to be due and owing to it for materials furnished and services performed in connection with the construction of the Carbon and Carbide Building in Chicago. Plaintiff's claim is predicated on a written agreement made by the defendant that if plaintiff would not file its claim for lien against the building the defendant would pay plaintiff's claim. There was a trial by the court and a finding and judgment in plaintiff's favor for $2429, and defendant appeals.

The record discloses that the defendant was the general contractor in connection with the construction of the Carbon and Carbide Building; that the John Degnan company, a corporation, had entered into a sub-contract with defendant to do a part of the work and the John Degnan Company had entered into another contract with plaintiff, the Johnson Service Company, a corporation, whereby the latter agreed to do a part of the work mentioned in the Degnan contract. Plaintiff performed the work and there was a balance due it of $2429, which plaintiff had been unable to collect from the Degnan company and had taken the matter up a number of times with the defendant, the general contractor, stating that plaintiff's bill was due and unpaid, that plaintiff had received no money from the John Degnan company, although plaintiff's work had been completed, and that plaintiff's right to file a claim for lien would expire on September 26, 1939, and unless plaintiff received payment before September 23rd it would take steps to file its claim for lien on

[illegible] COURT.
[illegible],
[illegible].

vs.

[illegible], a corporation,
Appellant.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover $2100 claimed to be due and owing to it for materials furnished and services performed in connection with the construction of the Carbon and Cardale Building in Chicago. Plaintiff's claim is predicated on a written agreement made by the defendant that if plaintiff would not file its claim for lien against the building the defendant would pay plaintiff's claim. There was a trial by the court and a finding and judgment in plaintiff's favor for $2100, and defendant appeals.

The record discloses that the defendant was the general contractor in connection with the construction of the Carbon and Cardale Building; that the John Degnan company, a corporation, had entered into a sub-contract with defendant to do a part of the work and the Jules Degnan Company had entered into another contract with plaintiff, the former Degnan Company, a corporation, agreeing the latter agreed to do a part of the work mentioned in the Degnan contract. Plaintiff performed the work and there was a balance due it of $2100, which plaintiff had been unable to collect from the Degnan company and had taken the matter up a number of times with the defendant, the general contractor, asking that plaintiff's bill was due and unpaid, that plaintiff had received no money from the John Degnan company, although plaintiff's work had been completed, and that plaintiff's right to file a claim for lien would expire on September 30, 1929, and unless plaintiff received payment before September 30rd it would take steps to file its claim for lien on

the building. Afterwards defendant wrote a letter to plaintiff, which is the basis of plaintiff's claim and which is as follows: "Re: Carbon and Carbide Bldg. Gentlemen: In accordance with our telephone conversation of even date, we, herewith, agree to pay in full your account with John Degnan, Inc., on the above job, as soon as we receive affidavit from John Degnan, Inc. Very truly yours, Paschen Brothers By A. W. Dubs."

A witness for plaintiff testified that he telephoned the defendant advising it that plaintiff was going to file a claim for lien on the building; that the secretary and treasurer of the defendant replied that it would be very embarrassing for Paschen Brothers and the Carbon and Carbide Company for plaintiff to file a claim for lien; that the witness then replied that the claim would not be filed if the defendant would guarantee and pay the account and give plaintiff a letter to that effect; that defendant agreed to do this, and thereafter plaintiff received the letter above quoted. The evidence further shows that the affidavit mentioned in the letter above quoted was delivered to the defendant.

The defendant contends that the promise of the defendant made in the letter was without consideration and therefore void. We think it clear this contention cannot be sustained. The promise of the plaintiff not to file its claim for lien against the building was a sufficient consideration for the defendant's promise to pay the bill against the John Degnan company, and the promise being in writing is legal and valid. Herbert v. Mueller, 83 Ill. App. 391; Cornell v. Central Electric Company, 61 Ill. App. 325.

The defendant further contends that the writer of the letter upon which plaintiff sues was without authority to bind the defendant; but this contention is not available to the defendant because in its affidavit of merits it admitted the writing and de-

the building. Afterwards defendant wrote a letter to plaintiff, which is the basis of plaintiff's claim and which is as follows:

"To: Carbon and Carbide Bldg. Gentlemen: In accordance with our telephone conversation of even date, we, herewith, agree to pay in full your account with John Degnan, Inc., on the above job, as soon as we receive affidavit from John Degnan, Inc. Very truly yours, Paulson Brothers By A. W. Dube."

A witness for plaintiff testified that he delivered the instrument covering it when plaintiff was going to file a claim for lien on the building; that the secretary and treasurer of the defendant replied that it would be very embarrassing for Paulson Brothers and the Carbon and Carbide Company for plaintiff to file a claim for lien; that the witness then replied that the claim would not be filed if the defendant would guarantee and pay the account and give plaintiff a letter to that effect; that defendant agreed to do this, and thereafter plaintiff received the letter above quoted. The evidence further shows that the affidavit mentioned in the letter above quoted was delivered to the defendant.

The defendant contends that the promise of the defendant made in the letter was without consideration and therefore void. We think it clear this contention cannot be sustained. The promise of the plaintiff not to file its lien claim for lien against the building was a sufficient consideration for the defendant's promise to pay the bill against the John Degnan company, and the promise being in writing is legal and valid. Kenney v. Snyder, 21 Ill. App. 271; Patrick v. Central Electric Company, 21 Ill. App. 118.

The defendant further contends that the writer of the letter upon which plaintiff sues was without authority to bind the defendant; but this contention is not available to the defendant because in its affidavit of merits it admitted the writing and de-

livery of the letter which was set forth verbatim in plaintiff's statement of claim.

A further point is made that the court improperly restricted the defendant when it sought to put in evidence concerning the bankruptcy of the John Degnan company, which was then pending in the Federal courts; that the evidence shows plaintiff filed its claim against the bankrupt and therefore could not have two recoveries upon the same claim. There is no evidence that plaintiff received any money on account of this claim in the bankruptcy court, but on the contrary the evidence is to the effect that plaintiff had not been paid any part of its claim. Of course, plaintiff can receive but one satisfaction of its claim, and if this judgment is paid by the defendant it would be entitled to any amount coming to plaintiff in the bankruptcy proceedings on the ground that it was subrogated to plaintiff's rights.

A further point is made that there was no evidence on the trial that plaintiff could have maintained its claim for lien on the building, and that unless this were shown there was no consideration for defendant's promise. We think this contention is not in accordance with the law because it appears that plaintiff was honestly asserting its claim for lien; this was sufficient. Cornell v. Central Electric Co., supra. In that case it was held that an agreement to forbear to sue for a certain time is a good consideration to support a promise to pay and that it was not material that the plaintiff's right to recover should exist; that if plaintiff's claim, although a doubtful one, was honestly asserted, the agreement to forbear was a sufficient consideration. The court there said, p. 327: "Nor is it material that the certain right to recover in the suit forborne should exist. If the right were honestly asserted, though a doubtful one, the agreement to forbear

library of the latter which was set forth [illegible] in plaintiff's statement of claim.

A further point is made that the court improperly restricted the defendant when it sought to put to witness concerning the bankruptcy of the Jann Dayman company, which was then pending in the Federal courts; that the evidence shows plaintiff filed its claim against the bankrupt. Jann creditors could not have two recoveries upon the same claim. There is no evidence that plaintiff received any money on account of this claim in the bankruptcy court, but on the contrary the evidence is to the effect that plaintiff has not been paid any part of its claim. Of course, plaintiff can recover but one satisfaction of its claim, and if this judgment is paid by the defendant it would be entitled to any amount which plaintiff in the bankruptcy proceedings or the trustee that it was entitled to plaintiff's rights.

A further point is made that there was no evidence on the trial that plaintiff ever have maintained the claim for lien on the building, and that unless this were shown there was no consideration for defendant's promise. We think this contention is not in accordance with the law because it appears that plaintiff was currently asserting its claim for lien; this was sufficient. *Carroll v. Sweeney*, 21 Wash. 76. In that case it was held that an agreement to forbear to sue for a certain time is a good consideration to support a promise to pay and that it was not material that the plaintiff's right to recover might exist; that if plaintiff's claim, although a doubtful one, was honestly asserted, the agreement to forbear was a sufficient consideration. The court there said, p. 327: "Nor is it material that the certain right to recover in the suit forbore should exist. If the right were honestly asserted, though a doubtful one, the agreement to forbear

its prosecution is based upon a sufficient consideration. Honeyman v. Jarvis, 79 Ill. 318; Pool v. Decker, 92 Ill. 501; Knotts v. Preble, 50 Ill. 226."

A further point is made that since there is evidence to the effect that plaintiff might have collected the amount due it from the John Degnan company, but neglected to do so, and since it further appears that the defendant paid the John Degnan company the amount of its contract, which included the amount claimed by plaintiff, the loss should be borne by plaintiff, both plaintiff and defendant being innocent parties, and that plaintiff's negligence was the cause of loss. There is evidence to the effect that plaintiff was unable to collect from the John Degnan company, that the latter was insolvent and went into bankruptcy. Plaintiff was about to file its claim for lien and waived its right to do so by reason of the defendant's promise to pay. In these circumstances we think the defendant's contention cannot be maintained.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

its prosecution is based upon a sufficient consideration. Freeman v. Jarvis, 77 Ill. 362; Ohl v. Meier, 44 Ill. 351; Smith v. Treble, 36 Ill. 258."

A further point is made that since there is evidence to the effect that plaintiff might have collected the amount due it from the John Deere company, but neglected to do so, and since it further appears that the defendant paid the John Deere company the amount of its subpoena, which indicates the amount claimed by plaintiff, the loss should be borne by plaintiff, both plaintiff and defendant being innocent parties, and that plaintiff's negligence was the cause of loss. There is evidence to the effect that plaintiff was unable to collect from the John Deere company, that the latter was insolvent and very late bankrupt. Plaintiff was about to file its claim for lien and waived its right to do so by reason of the defendant's promise to pay. In these circumstances we think the defendant's contention cannot be maintained.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Sullivan, J., concur.

35009

FREDERICK C. SOMMERS,
Appellee,

vs.

DIVERSEY STORE FIXTURE COMPANY,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

261 I.A. 644

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of trover against the defendant. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for $338, and the defendant appeals.

The record discloses that on January 26, 1928, plaintiff and his then partner bought from defendant certain fixtures to be used by them in the conduct of a restaurant in Chicago, and on that day executed their chattel mortgage to secure the payment of $1213 as evidenced by 42 chattel mortgage notes which came due at stated times. The fixtures were secondhand and whether there was any down payment does not appear. Afterwards plaintiff and his partner proceeded to conduct a restaurant, using the fixtures in the premises at 2771 Lincoln avenue, Chicago, and some of the notes secured by the chattel mortgage were subsequently paid. Plaintiff became the sole owner of the premises and in October, 1928, defendant foreclosed the chattel mortgage, the property being sold to the defendant at the foreclosure sale, there being no other bidders, for $750.

A short time thereafter plaintiff served a written notice on defendant, claiming that defendant had sold property belonging to plaintiff which he used in conducting the restaurant and which was not covered by the chattel mortgage. It is to recover the value of such property that plaintiff sues.

[illegible]

THEODORE C. SCHMIDT,
Appellee,

vs.

ATTORNEY GENERAL'S VICTORY CONSTRUCTION
& Corporation,
Appellant.

Appeal from circuit court
of Cook county.

2 Ill. App. 2d 444

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of trover against the defendant. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for $[illegible], and the defendant appeals.

The record discloses that on January 26, 1929, plaintiff and his then partner bought from defendant certain fixtures to be used by them in the conduct of a restaurant in Chicago, and on that day executed their chattel mortgage to secure the payment of $1833 as evidenced by 42 chattel mortgage notes which came due at stated times. The fixtures were accounted and whether there was any down payment does not appear. Afterwards plaintiff and his partner proceeded to conduct a restaurant, using the fixtures in the premises at 2771 Lincoln avenue, Chicago, and some of the notes secured by the chattel mortgage were subsequently paid. Plaintiff became the sole owner of the premises and in October, 1932, defendant foreclosed the chattel mortgage, the property being sold to the defendant at the foreclosure sale, there being no other bidders, for $[illegible].

A short time thereafter plaintiff served a written notice on defendant, claiming that defendant had said property belonging to plaintiff which he used in conducting the restaurant and which was not covered by the chattel mortgage. It is to recover the value of such property that plaintiff sues.

Plaintiff's evidence is to the effect that the property which he had in the restaurant, and which defendant sold in the foreclosure proceeding, and which was not covered by the mortgage, consisted of linoleum, cigars, dishes, cooking utensils, fan, electric sign, silverware, plumbing work, electric fixtures and wiring. There is no evidence as to the value of this property.

The defendant's position is that all of the property defendant used in his restaurant at 2771 Lincoln avenue was covered by the chattel mortgage even though some of it had not been purchased by plaintiff from defendant, and in support of this contention relies upon a provision in the chattel mortgage which is as follows: "Equipment and tools contained in premises of the undersigned. All the above to be used by the undersigned and contained in the premises at 2771 Lincoln avenue, Chicago, Illinois." This provision is in typewriting and follows a typewritten enumeration of the property covered by the chattel mortgage such as: One top lunch counter; one vitrolite top back counter; 12 stools; one cooler; one pie case; one battery of urns; five vitrolite top tables; five vitrolite top tables; one meat block; one table; 32 chairs; one cash register; one ice box; one steam table; one gas range; one cigar case; one sink; all plate rail partition.

In view of the fact that plaintiff was purchasing second-hand fixtures for the restaurant, as above enumerated, from defendant and was giving his chattel mortgage to secure the payment of the purchase price or a part of it, if the defendant was obtaining a mortgage not only on the property then sold by it to plaintiff, but on other property owned by plaintiff and used by him in the premises, the chattel mortgage should have been more specific so that this question would be free from doubt.

Whether it was intended by the parties that the mortgage should cover all the property in the premises, although part of it

Plaintiff's evidence is to the effect that the property which he had in the restaurant, and which defendant sold in the foreclosure proceeding, and which was not covered by the mortgage, consisted of linoleum, algere, kitchen, cooking utensils, ice, electric sign, silverware, plumbing work, electric fixtures and wiring. There is no evidence as to the value of this property.

The defendant's position in regard to the property defendant used in his restaurant at 2771 Lincoln avenue was covered by the omitted mortgage even though some of it had not been purchased by plaintiff from defendant, and in support of this contention reliance is upon a provision in the chattel mortgage which reads:

"Equipment and tools contained in premises of the undersigned. All the above to be used by the undersigned and contained in the premises at 2771 Lincoln avenue, Chicago, Illinois." This provision is in typewriting and follows a typewritten enumeration of the property covered by the chattel mortgage such as: one ice lunch counter; one electric refrigerator; 12 stools; one counter; one gas range; one battery of urns; five aluminum top tables; five aluminum top tables; six steel chairs; one table; 32 chairs; one cook regulator; one ice box; one steam table; one gas range; one cigar case; one sink; all plate wall partition.

In view of the fact that plaintiff was purchasing second-hand fixtures for the restaurant, as above enumerated, from defendant and was giving his chattel mortgage to secure the payment of the purchase price or a part of it, if the defendant was obtaining a mortgage not only on the property then sold by it to plaintiff, but on other property owned by plaintiff and used by him in the premises, the chattel mortgage should have been more specific so that this question would be free from doubt.

Whether it was intended by the parties that the mortgage should cover all the property in the premises, although part of it

hadnot been bought from the defendant, we think is uncertain. It seems unusual that the defendant, who was selling second-hand fixtures to plaintiff, was not satisfied that payment of the purchase price or a part of it would be secured by holding a chattel mortgage on the property but that he must also have the mortgage cover other property belonging to plaintiff. The mortgage apparently having been prepared by defendant, any doubt on this question should be resolved against it. We therefore hold that the chattel mortgage did not cover any property owned by plaintiff which had not been purchased from the defendant.

The evidence in the record as to the value of the several pieces of property not covered by the mortgage is not in all cases as specific as it might have been, but upon a careful consideration of all the evidence in the record, we are of the opinion that the value of such property as shown by the evidence was considerably more than the amount of the finding and judgment.

We think the testimony of plaintiff as to the value of the several pieces of property was competent, and it was not necessary that it appear from the evidence that plaintiff was an expert in this respect. The evidence was sufficient to warrant the court in finding that plaintiff knew the value of the property concerning which he testified. Upon a consideration of all the evidence in the record, we think we would not be warranted in disturbing the finding and judgment as being against the manifest weight of the evidence.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

Dachat been bought from the defendant, we think is immaterial. It seems manifest that the defendant, who was selling second-hand furniture to plaintiff, was not entitled that payment of the purchase price as a part of it would be secured by chattel mortgage on the property but that he must also have the mortgage over other property belonging to plaintiff. The mortgage apparently having been procured by defendant, why should no title question should be received against it. We therefore hold that the chattel mortgage did not cover any property owned by plaintiff which had not been purchased from the defendant.

The evidence in the record as to the value of the several pieces of property not covered by the mortgage is not in such as specific as it might have been, but upon a careful consideration of all the evidence in the record, we are of the opinion that the value of such property as shown by the evidence was considerably more than the amount of the finding and judgment.

We think the testimony of plaintiff as to the value of the several pieces of property was competent, and it was not necessary that it appear from the evidence that plaintiff was an expert in this respect. The evidence was sufficient to warrant the court in finding that plaintiff was the owner of the property mentioned which be testified. Upon a consideration of all the evidence in the record, we think we could not be warranted in disturbing the finding and judgment as being against the manifest weight of the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Baldwin, P. J., and Gardner, J., concur.

35086

THEODORE B. WELLS, by his next friend, HERBERT J. WELLS,
Appellee,

vs.

ANN NAYLOR WELLS,
Appellant.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK COUNTY.

261 I.A. 645

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

December 11, 1930, Herbert J. Wells filed a petition in the Circuit court of Cook county stating that he was a resident of Kingston, Rhode Island, and a brother of Theodore B. Wells, who resided in the village of LaGrange, Cook county, Illinois; that said Theodore had no relative in Cook county as near of kin to him as was the petitioner, and that no guardian for his personal property had been appointed; that said Theodore was past ninety years of age and that for years he had been infirm in body and in mind; that said Theodore with his wife Mary A. Wells had lived at a sanitarium at Hinsdale, Illinois, where he was under the care of a physician and an attendant; that Theodore and his wife lived happily together as husband and wife for about sixty-five years prior to May 31, 1930, when she died. The petition further averred that the shock of her death further impaired the physical and mental condition of Theodore Wells, and that thereafter on August 19, 1930, Ann D. Naylor, a woman between 45 and 50 years of age who had for a period of about ten years acted as nurse to Theodore, led him into a clandestine, surreptitious and pretended marriage with her at Crown Point, Indiana; that the pretended marriage by reason of the incapacity of Theodore to enter into and consummate the same was null and void; that he was incapable of taking care of his property; that Ann D. Naylor designed to possess the same and to that end caused the supposed marriage ceremony to be performed.

December 31, 1930, Theodore H. Wells filed a petition in the District Court of Cook county stating that he was a resident of Kingston, Rhode Island, and a brother of Theodore H. Wells, who resided in the village of Lakewood, Cook county, Illinois; that said Theodore had no relative in Cook county or near of kin so far as was the petitioner, and that no guardian for his personal property had been appointed; that said Theodore was past ninety years of age and that for years he had been infirm in body and in mind; that said Theodore with his wife Mary A. Wells had lived at a sanitarium at Kenosha, Illinois, where he was under the care of a physician and an attendant; that Theodore and his wife lived happily together as husband and wife for about sixty-five years prior to Oct 31, 1930, when she died. The petition further stated that the shock of her death further impaired the physical and mental condition of Theodore Wells, and that thereafter on August 19, 1930, Ann B. Taylor, a woman between 45 and 50 years of age who had for a period of about ten years acted as nurse to Theodore, led him into a clandestine, surreptitious and pretended marriage with her at Green Lake, Indiana; that the pretended marriage by reason of the incapacity of Theodore to enter into and consummate the same was null and void; that he was incapable of taking care of his property; that Ann B. Taylor designed to possess the same and to that end caused the supposed marriage ceremony to be performed.

The petitioner presented a bill of complaint, setting up these and other facts and praying that the marriage might be annulled, for an injunction, for a receiver for the property, and for other relief. An order was entered appointing the petitioner next of friend for his brother Theodore and granting leave to file the bill.

Defendant was served on December 13, 1930, and entered her appearance January 15th thereafter. February 7, 1931, she answered the bill admitting some of the facts, denying others, asserting the capacity of Theodore Wells to contract the marriage and that she was his lawful wife, and denying the equities of the bill. February 2, 1931, the next of friend filed a petition setting up the proceedings as heretofore recited and stating that Theodore Wells, under the last will and testament of his wife, Mary A. Wells, received property valued upwards of $30,000; that he held insurance policies payable to his estate to the amount of more than $5,000, and that his whole estate was worth more than $35,000; that at the time of the pretended marriage Theodore B. Wells had in his bank account from $1,000 to $1,300; that shortly after said marriage an order was entered by the County court of DuPage county where the estate of Mary A. Wells was in the course of probate, permitting and directing payment to said Theodore of the sum of $65 a week, which has since been paid to him; that subsequent to the filing of the bill of complaint application was made either by Theodore, or Ann Naylor on his behalf, for loan or cash settlement on the insurance policies of the sum of $1,079 on one policy and the sum of $4,324 on the other policy; that also subsequent to the filing of the bill, upon request of the solicitors for Ann Naylor, a legacy of $1,000 had been paid either to Theodore or to Ann from the estate of a deceased brother of Theodore; that altogether since said marriage there had been paid

The petitioner presented a bill of complaint, setting forth that the plaintiff and praying that the marriage might be annulled, for an injunction, for a receiver for the property, and for other relief. An order was entered appointing the petitioner next of friend for his brother Theodore and granting leave to file the bill.

Defendant was served on December 12, 1930, and entered her appearance January 12th thereafter. February 7, 1931, she answered the bill admitting some of the facts, denying others, asserting the capacity of Theodore Wells to contract the marriage and that she was his lawful wife, and denying the jurisdiction of the bill. February 7, 1931, the next of friend filed a petition setting up the proceedings as aforesaid and stating that Theodore Wells, under the last will and testament of his wife, Mary A. Wells, received property valued upwards of $30,000; that he held insurance policies payable to his estate to the amount of more than $2,000, and that his whole estate was worth more than $32,000; that at the time of the pretended marriage Theodore H. Wells had in his bank account from $1,000 to $1,300; that shortly after said marriage an order was entered by the County court of Defoe county where the estate of Mary A. Wells was in the course of probate, permitting and directing payment to said Theodore of the sum of $12 a week, which his claim has yielded it him; that subsequent to the filing of the bill of complaint application was made either by Theodore, or Ann Boylet on his behalf, for loan or cash settlement on the insurance policies of the sum of $1,070 on one policy and the sum of $4,320 on the other policy; that also subsequent to the filing of the bill, upon request of the solicitors for Ann Boylet, a loanoy of $1,000 had been paid either to Theodore or to Ann from the estate of a deceased brother of Theodore; that altogether since said marriage there had been paid

to Theodore or Ann moneys amounting to upwards of $7,500, which the petitioner averred had been or was about to be dissipated by Ann Naylor, and that all of the money had been procured at the instigation, suggestion and in accordance with the desires and wishes of Ann D. Naylor and in pursuance of her plan to secure for herself the property of Theodore Wells; that unless a receiver was appointed the property of Theodore Wells would be dissipated and wasted and he would be deprived of the same to his great damage. The petition prayed that a receiver might be appointed to take over, handle and conserve the property, with power to make disbursements to Theodore B. Wells as the same should be proper, and that Ann D. Naylor might be required to account to the receiver. The petition was verified by the next friend, who stated in the verification that the same was true except as to such matters as were therein stated to be upon information and belief. Neither the bill to annul the marriage nor the answer thereto was verified.

The chancellor after notice and a hearing appointed the LaGrange State Trust & Savings Bank (which was also acting as executor of the last will and testament of Mary A. Wells) receiver, and this appeal is prosecuted by defendant from that order. The order recites that the matter came on for hearing upon the petition "and from statements of counsel, both for complainant and defendant, in open court," the court found that Theodore B. Wells was upwards of 90 years of age; that he was too ill and feeble to be brought into court or to be disturbed by a hearing at his residence in La Grange as to his competency to manage his affairs; that his wife, Mary A. Wells, with whom he lived for upwards of 65 years, died May 31, 1930; that the said Theodore B. Wells and his nurse, Ann D. Naylor, went to Crown Point, Indiana, August 19, 1930, where a license was procured and a marrage ceremony performed pronouncing

to Theodore or Ann money amounting to upwards of $7,000, which the petitioner averred had been or was about to be dissipated by Ann Hayler, and that all of the money had been procured at the instigation, suggestion and by assistance with the knowledge of Ann E. Hayler and in pursuance of her plan to secure for herself the property of Theodore Wells; that unless a receiver was appointed the property of Theodore Wells would be dissipated and wasted and he would be deprived of the use to his great damage. The petition prayed that a receiver might be appointed to take over, handle and conserve the property, with power to make disbursements to Theodore E. Wells as the same should be proper, and that Ann E. Hayler might be required to account to the receiver. The petition was verified by the oath Trimmel, who stated in the verification that the same was true except as to such matters as were therein stated to be upon information and belief. Neither did he fail to annul the multiple per the answer thereto was verified.

The chancellor after notice had a hearing upon the instant State Trust & Savings Bank (which was also acting as executor of the last will and testament of Mary A. Wells) receiver, and this appeal is prosecuted by defendant from that order. The order recites that the matter came on for hearing upon the petition "and from statements of counsel, both for complainant and defendant, in open court," the court found that Theodore E. Wells was upwards of 20 years of age; that he was too ill and feeble to be brought into court or to be disturbed by a hearing at his residence in Lexington or in his sanatorium to manage his affairs; that his wife, Mary A. Wells, with whom he lived for upwards of 25 years, died May 23, 1930; that the said Theodore E. Wells and his nurse, Ann E. Hayler, and in fact Fritz, Indiana, where is, indeed, where a liquor was procured and a marriage ceremony performed pronouncing

them man and wife; that said parties were living at LaGrange, Cook county, Illinois; that pursuant to order of court, a bill for annulment of the marriage was filed December 11, 1930, and was then pending; that Theodore B. Wells inherited from his wife, Mary A. Wells, an estate of upwards of $30,000, and that he had insurance of $5,000 and a legacy of $1000; that on August 19, 1930, his property amounted to upwards of $35,000, all of which was personal property; that since that date upwards of $7500 of the property had been collected by Theodore Wells or by someone on his behalf; that upwards of $6000 of this amount had been collected since the filing of the bill for annulment of the marriage; that this sum of $6000 was composed of sums from insurance policies held on the life of Theodore Wells and of $1000 from the estate of a deceased brother; that at the time of collecting these sums Theodore B. Wells was receiving a pension of $80 a month and the sum of $60 a week from the estate of his deceased wife, Mary A. Wells, on an order of the Probate court of DuPage county, Illinois; that it appeared from the statements of the soliciter for defendant in open court that the said sums of money, amounting to approximately one-fourth of all of the possessions of Theodore B. Wells had been spent; that it further appeared from facts positively alleged in the petition and from the evidence and statements of counsel in open court that the remainder of the property of Theodore B. Wells was in danger of being dissipated, and that the petitioner was entitled to relief as prayed in the petition.

It is urged in the brief submitted in behalf of defendant that the court was without jurisdiction to appoint a receiver because it did not have jurisdiction either of the person or of the property of Theodore B. Wells; and Isle, Admr. vs. Cranby 199 Ill. 39, is cited to that point. However, upon oral argument where the matter was fully presented, counsel for defendant admitte

them man and wife; that each party was living at Lafayette, Cass county, Illinois; that pursuant to order of court, a bill for annulment of the marriage was filed December 11, 1930, and was then pending; that Theodore R. Walls inherited from his wife, Mary A. Walls, an estate of upwards of $30,000, and that he had insurance of $5,000 and a legacy of $1000; that on August 19, 1931, his property amounted to upwards of $30,000, all of which was personal property; that since that date upwards of $7000 of the property had been collected by Theodore Walls or by someone on his behalf; that upwards of $4000 of this amount had been collected since the filing of the bill for annulment of the marriage; that this sum of $4000 was expended of such item insurance policies held on the life of Theodore Walls and of $1000 from the estate of a deceased brother; that at the time of collecting these sums Theodore R. Walls was receiving a pension of $40 a month and the sum of $80 a week from the estate of his deceased wife, Mary A. Walls, on an order of the Probate court of Tuscan county, Illinois; that it appeared from the statements of the solicitor for defendant in open court that the said sums of money, amounting to approximately one-fourth of all of the possessions of Theodore R. Walls had been spent; that it further appeared from facts practically alleged in the petition and from the evidence and statements of counsel in open court that the remainder of the property of Theodore R. Walls was in danger of being dissipated, and that the petitioner was entitled to relief as prayed in the petition.

It is urged in the brief submitted in behalf of defendant that the court was without jurisdiction to appoint a receiver because it did not have jurisdiction either of the person or of the property of Theodore R. Walls; and Ills. Ann. Stat. Ch. 33, Par. 190 Ill. 33, is cited to that point. However, upon oral argument where the matter was fully presented, counsel for defendant admits

that the court had jurisdiction.

The controlling question in the case therefore is whether the court erred in appointing a receiver. There is no doubt of the fundamental rule for which defendant contends and to which she cites a number of cases; - a receiver should not be appointed except on proof of grounds showing fraud or immediate danger to the property unless it is taken into the custody of the court. It is pointed out that the bill of complaint is not verified and therefore may not be considered as proof; that it being admitted that the marriage was celebrated, everything essential to the validity of the marriage, including the capacity of the parties, would be presumed, as was held in Winter v. Dibble, 251 Ill. 200; that the competency of every person is presumed until the contrary is shown by competent evidence (People v. Spencer, 264 Ill. 124.) However, all this being conceded, we are unconvinced that the court abused its discretion in appointing a receiver under circumstances such as the record discloses. A careful reading of the bill and the answer, as well as the petition and the facts recited in the order, apparently based on admissions of counsel, has convinced us that in view of the fact that the estate of the complainant is rapidly being dissipated, the same might well be conserved by the appointment of a receiver until such time as the case should be heard upon the merits.

It was stated upon oral argument, although the same does not appear in the record, that the hearing was adjourned by the chancellor for the express purpose of allowing complainant to be brought into court and that when it was represented to the court that this was quite impossible, the court suggested a visit to complainant by a commissioner of the court, to which proposal defendant refused to accede.

The failure of this bridegroom of ninety years to

that the entry had jurisdiction.

The controlling question in the case therefore is whether the court erred in appointing a receiver. There is no doubt of the fundamental rule for which defendants contends and is which also often a number of cases; - a receiver should not be appointed except on proof of grounds showing fraud or immediate danger to the property unless it is taken into the custody of the court. It is pointed out that the bill of complaint is not verified and therefore may not be considered as proof; that it being admitted that the marriage was established, everything essential to the validity of the marriage, including the capacity of the parties, could be presumed, as was held in Miller v. Miller, 281 Ill. 500; that the competency of every person is presumed until the contrary is shown by competent evidence (People v. Spencer, 264 Ill. 124.) However, all this being conceded, we are unconvinced that the court abused its discretion in appointing a receiver under circumstances such as the record discloses. A careful reading of the bill and the answer, as well as the petition and the facts recited in the order, apparently based on admissions of counsel, has convinced us that in view of the fact that the assets of the complainant in reality being dissipated, the same might well be conserved by the appointment of a receiver until such time as the case should be heard upon the merits.

It was stated upon oral argument, although the same does not appear in the record, that the hearing was adjourned by the chancellor for the express purpose of allowing complainant to be brought into court and that when it was represented to the court that this was quite impracticable, the court suggested a visit to complainant by a commissioner of the court, to which proposal defendant returned no assent.

The failure of this bridegroom of ninety years to

appear in defense of the bride or indicate any interest in the case, and the refusal of the defendant to permit the actual facts as to complainant's condition to be ascertained, in our opinion speak eloquently of the wisdom and necessity for the appointment of a receiver. This will hold matters in statu quo until the rights of the parties are determined by trial.

The order will be affirmed.

AFFIRMED.

O'Connor, J., concurs.

McBurely, J., dissents.

anyone in defense of the title of Lucinda may believe in the same, and the defense of Eli McCullough to provoke the attack [illegible] McCullough's [illegible] to be associations, in our [illegible] work [illegible] of the [illegible] and consequently the [illegible] of a [illegible]. This will [illegible] to [illegible] until the [illegible] of the [illegible] are [illegible] by [illegible].

The story will be [illegible].

ADDISON.

O'Connor, J., [illegible].

Lafferty, J., [illegible].

34555

HENRY BROTT, for use of HARRY WILK and JOSEPH ROSEN, doing business as WILK & ROSEN,

Defendant in Error,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation, Garnishee,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

261 I.A. 645

Opinion filed April 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Harry Wilk and Joseph Rosen, doing business as Wilk & Rosen, recovered a judgment against Henry Brott for $212.66 on April 14, 1929. Execution was issued and returned, "No property found" November 14, 1929. On the same day an affidavit for garnishment was filed and summons issued to the Metropolitan Life Insurance Company and the West Side Trust & Savings Bank, as garnishees. The West Side Trust & Savings Bank filed its answer admitting that it had $19.53 and judgment was entered for the use of the plaintiff for said sum and the time to answer for the defendant Metropolitan Life Insurance Company was extended ten days.

December 5, 1929, the answer of the Metropolitan Life Insurance Company was filed denying any indebtedness to the said defendant Brott.

December 18, 1929, default was entered and judgment taken against the Metropolitan Life Insurance Company for $212.66.

January 29, 1930, the Metropolitan Life Insurance Company entered its motion to vacate said judgment and filed a petition in support of the same. The petition, among other things, alleged:

> "That the judgment was void because Henry Brott was an employee of the plaintiff in error, was a married man, head of a family, residing with the same and employed by the garnishee on a salary basis and the plaintiff in said action

Opinion filed April 15, 1921

Mr. PRESIDING JUSTICE DIBELL delivered the opinion of the court:

Harry Silk and Joseph Karen, doing business as Silk & Karen, recovered a judgment against Harry Brown for $313.80 on April 14, 1920. Execution was issued and returned, "No property found" December 14, 1920. On the same day an affidavit for garnishment was filed and summons issued to the Metropolitan Life Insurance Company and the West Side Trust & Savings Bank, as garnishees. The West Side Trust & Savings Bank filed its answer admitting that it had $19.85 and judgment was entered for the use of the plaintiff for said sum and the bank to answer for the defendant Metropolitan Life Insurance Company was stricken for the term.

December 6, 1920, the answer of the Metropolitan Life Insurance Company was filed denying any indebtedness to the said defendant Brown.

November 18, 1920, default was entered and judgment taken against the Metropolitan Life Insurance Company for $313.80.

January 10, 1921, the Metropolitan Life Insurance Company entered its motion to vacate said judgment and filed a petition in support of the same. The petition, among other things, alleged:

"That the judgment was with Benjamin Henry Brown and on employee of the plaintiff in error, was a married man, head of a family, residing with the same and employed by the garnishee as a street truck and the plaintiff in said action

failed to comply with Chapter 62, Paragraph 14 of Cahill's Statutes, 1923, and to serve and deliver a copy of a demand to the employee, etc., and to serve a copy of the demand on the employer and file the demand with the clerk of court with service endorsed thereon at least twenty-four hours previous to bringing suit with the returns sworn to; that the summons was unlawfully issued and did not require any answer."

It is also charged in the petition that the appearance of the defendant Metropolitan Life Insurance Company was of record and that it had filed its answer, stating it was not indebted and that no motion was made to strike the answer from the files, and further that there was a judgment entered against another defendant and that there was not due to the plaintiff in said original suit the amount of $212.86, because of its reduction by the judgment against the co-defendant. Upon the argument before the trial court, counsel for plaintiff stated that he would not file an answer, but would treat the petition as containing facts that were true, and filed his motion to strike the petition from the files and to have the hearing treated as a demurrer to the petition, and the court so considered it. The same question was before this court in the case of Para v. Reliable Furn. Mfg. Co., 237 Ill. App. 400. The court in its opinion says:

"It is urged by counsel for the Furniture Company, for various reasons stated, that the court erred in not vacating the judgment of July 2, 1924, even though more than 30 days had passed after its rendition before the motion to vacate it was made. We shall only discuss one of counsel's points, namely, that the judgment is void, under the provisions of section 14 of the Garnishment Act, in that before the garnishee summons was issued and served no proper demand in writing was personally served either upon Para, the employee or wage earner, or the Furniture Company, the employer; and being void, as distinguished from being merely erroneous, it may be attacked at any time even after the expiration of 30 days from the date of its rendition.

We are of the opinion that the point is well taken and that said judgment, under said Act, is void, and that the court erred in not sustaining the motion of the Furniture Company to vacate it."

The case of Para v. Reliable Furn. Mfg. Co., supra, is based upon its construction of section 14 of the Garnishment Act, Cahill's Illinois Revised Statutes, which provides that, "Before

failed to comply with section 22, paragraph 12 of Cahill's Illinois, 1933, and he never had obtained a copy of a bond for the employee, etc., and he never a copy of the bond on the employee and file the bond with the clerk of court also service mailed Cletus at least twenty-four hours previous to hearing; that with the exception of that the bond and affidavit issued was the most regular and sufficient issued in any county."

It is also charged in the petition that the appearance of the defendant corporation like insurance company was of record and that it had filed its answer, stating it was not indebted and that no motion was made to strike the answer from the record, nor further that there was a judgment entered against another defendant and that there was not due to the plaintiff in said original suit the amount of $333.00, because of its reduction by the judgment against the co-defendant. Upon the argument before the trial court, counsel for plaintiff stated that he would not file an answer, but would treat the petition as containing facts that were true, and filed his motion to strike the petition from the files and to have the hearing treated as a demurrer to the petition, and the court so considered it. The same question was before this court in the case of Kern v. Reliable Fire, Ins. Co., 287 Ill. App. 488. The court in its opinion says:

"It is argued by counsel for the plaintiffs in error, for various reasons, that the court erred in not vacating the judgment of July 6, 1936, even though more than 30 days had passed after the verdict before the motion to vacate it was made. In short, only issues are of counsel's choice, namely, that the judgment is void, under the provisions of section 14 of the Garnishment Act, in that before the garnishee summons was issued and served no process issued in writing was personally served within the county, the garnishee or any member of the insurance company, the employer, and being void, as distinguished from being merely erroneous, it may be attacked at any time even after the expiration of 30 days from the date of its rendition.

In one of the opinions that the court in said Kern and that said judgment, under said act, is void, and that the court erred in not sustaining the motion of the garnishee company to vacate it."

The case of Kern v. Reliable Fire, Ins. Co., supra, is based upon the construction of section 14 of the Garnishment Act, Cahill's Illinois Revised Statutes, which provides that, "before

bringing suit a demand in writing shall first be made upon the employee and the employer * * * and a copy of such demand shall be left with him and with the employer, having endorsed thereon the time of service, at least twenty-four hours previous to bringing such suit." The act also provides that a return shall be made with the clerk of the court, showing such service, and that any judgment rendered without said demand shall be void.

From the facts set out in the petition in support of the motion to vacate the judgment, it appears that this statute was not complied with. Under the provisions of the statute the judgment was void and should have been vacated.

We have not been aided in our consideration of the cause by any briefs on behalf of the plaintiff.

The order of the Municipal Court denying the motion for leave to file a petition and set aside the judgment against the garnishee, Metropolitan Life Insurance Company, is reversed and the cause is remanded to the Municipal Court with directions to vacate said judgment entered December 18, 1929.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL AND FRIEND, JJ. CONCUR.

bringing suit - amount in criminal court first to wait upon the employee and the employee's [illegible] and a copy of such demand shall be left with him and with the employer, within sixty minutes from the time of service, or later investigator there provided to bringing such suit." The act also provides that a return shall be made with the clerk of the court, showing such service, and that a judgment thereon without demand must be made.

When the Court set out the position in support of the motion to vacate the judgment, it appears that this statute was not complied with. Under the provisions of the statute the judgment was void and should have been vacated.

We have not been asked in our consideration of the cause by any party on behalf of the plaintiff.

The error of the Municipal Court denying the motion for leave to file a petition nunc pro tunc to set aside the judgment against the garnishee, Fitzsimmons City Insurance Company, is reversed and the cause is remanded to the Municipal Court with directions to vacate said judgment entered against it. -CFI.

REVERSED AND REMANDED WITH DIRECTIONS.

SCHOOL AND FILLING, JJ., concur.

34584

JOSEPH C. ENCHER, doing business under the name and style of LAKES & COMPANY,

(Plaintiff) Appellant,

v.

ANTON STAKENAS and ANELE STAKENAS,

(Defendants) Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

261 I.A. 645

Opinion filed April 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This was an action brought by Encher, the plaintiff, doing business under the name and style of Lakes & Company against the defendants, Anton Stakenas and Anele Stakenas, his wife, to recover the sum of $375, claimed to be due for services rendered as a broker in procuring a purchaser for certain real estate owned by the defendants.

From the facts it appears that on January 31,1928, a contract was entered into between Stakenas and his wife and one Joseph Lechavicz and his wife, under which the parties agreed to exchange properties. Among other provisions in the agreement was the following:

> "It is further mutually agreed that brokerage fees or commissions shall be paid to Zig Lakes & Co., $375.00 by first party and $300.00 by second party, by the respective parties hereto as heretofore agreed between them and said broker."

Upon the trial of the cause, the court permitted parol evidence on the part of the defendants for the purpose of showing the agreement between the plaintiff and the defendants at the time the contract was entered into.

JOHN C. LUDLOW, doing business under the name and style of LUDLOW & COMPANY,

(Plaintiff) Appellee,

v.

ARTHUR STARKEAGE and LUCILE STARKEAGE,

(Defendants) Appellees.

Opinion filed April 15, 1933

Mr. Justice Jones delivered the opinion of the court.

This was an action brought by JOHN C. LUDLOW, doing business under the name and style of Ludlow & Company against the defendants, Arthur Starkeage and Lucile Starkeage, his wife, to recover the sum of $375, claimed to be due for services rendered as a broker in procuring a purchaser for certain real estate owned by the defendants.

From the facts it appears that on January 21, 1929, a contract was entered into between Starkeage and his wife and one Joseph Lockwood and his wife, under which the parties agreed to exchange properties. Among other provisions in the agreement was the following:

"It is further mutually agreed that brokerage fees or commissions shall be paid in the name of Mr. Joe Lockwood by the first party and Mr. John C. Ludlow by second party, by the respective parties hereto as brokerage agreed between them and said broker."

Upon the trial of the cause, the court permitted parol evidence on the part of the defendants for the purpose of showing the agreement between the plaintiff and the defendants at the time the contract was entered into.

But one point is involved upon this appeal, namely, that the court erred in admitting this testimony. It is insisted on behalf of the plaintiff that as the contract was a written contract, oral testimony was inadmissible for explaining or changing its terms, and we are referred to the case of Merchants Loan & Trust Co. v. Umbach, 228 Ill. App. 67, holding that where a third person, not a party to a contract made for his benefit, seeks to enforce it, he is bound by the rule that parol evidence is not admissible. Such, however, is not the case here. The contract was not made for the benefit of plaintiff, but was between two parties seeking the exchange of properties.

This court in the case of Volandus v. Melaucksis, 227 Ill. App. 355, had occasion to pass on this question under the same set of facts. The court in its opinion on page 358, said:

> "The plaintiff was not a party to the contract introduced in evidence. If he has a valid claim against the defendant, it is by virtue of an entirely different agreement which exists between these two. It may be that the written contract between Melaucksis, Vaitonis and Juzenas is some evidence of what the agreement was between the plaintiff and Melaucksis. It tends to show that the agreement was that Melaucksis was to pay the plaintiff $300, but it does not show anything, one way or the other, as to when that payment was to be made,- whether it was to be made on the consummation of the contract or whenever the exchange was effected, or whether it was to be when the exchange was consummated. Clearly, evidence was admissible to establish the other terms of the agreement, and it cannot be said that such evidence has the effect of varying the terms of a written contract."

In the case at bar the contract, if any, between the plaintiff and the defendants was an oral agreement. It was competent as evidence in support of plaintiff's position, but for no other purpose. The court properly admitted parol evidence for the purpose of showing what the oral contract

One new point is involved upon this appeal, namely, that the court erred in admitting this testimony. It is insisted on behalf of the plaintiff that as the contract was a written contract, oral testimony was inadmissible for contradicting or changing its terms, but we are referred to the case of Vandenbrink Lumber & Trust Co. v. Thomas, 225 Ill. App. 97, holding that where a third person, not a party to a contract made for his benefit, seeks to enforce it, he is bound by the rule that parol evidence is not admissible. Much, however, is not the case here. The contract was not made for the benefit of plaintiff, but was between two parties seeking the exchange of properties.

This court in the case of Valandra v. Malmquist, 227 Ill. App. 388, had occasion to pass on this question under the same set of facts. The court in its opinion on page 389, said:

> "The plaintiff was not a party to the contract introduced in evidence. It be has a valid claim against the defendant, it is by virtue of an entirely different agreement which exists between these two. It may be that the written contract between Malmquist, Tjelmeland and Jensen is some evidence of what the negotiations and between the plaintiff and Malmquist. It does do show that the agreement was that Malmquist was to buy the plaintiff (?)C, but it does not make anything, one way or the other, as to when that payment was to be made.- whether it was to be made on the consummation of the contract or whenever the exchange was effected, or whether it was to be when the exchange was consummated. Clearly, evidence was admissible to establish the other terms of the agreement, and it seems to me this such evidence has the effect of stating the terms of a written contract."

In the case at bar the contract, if any, between the plaintiff and the defendants was an oral agreement. It was competent to evidence in support of plaintiff's position, but for no other purpose. The court properly admitted parol evidence for the purpose of showing what the oral contract

was between the plaintiff and the defendants.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

34620

SERVICE STATE BANK,
Appellant,
v.
MAX KULWINSKY,
Appellee.

46 A

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

261 I.A. 645

Opinion filed April 15, 1931

MR. PRESIDING JUSTICE FILSON delivered the opinion of the court.

The plaintiff, Service State Bank, recovered a judgment upon a promissory note for $597 together with costs against Max Kulwinsky in the Municipal Court of Chicago. Execution was issued and a debtor's schedule was filed. Thereupon summons in garnishment issued against Pioneer Trust & Savings Bank, Sidney Rosenweig, Pauline Meuller, S. Goldstein, Edward C. Rosenwald, P. Riddle and Charles Hyman. The individuals named as the garnishees appear to have been tenants in a certain building and the garnishment proceeding was based upon the theory that the rents owing by them were due and payable by them to Kulwinsky. Later on the Pioneer Trust & Savings Bank, a corporation, filed its intervening petition claiming the rents due in the hands of the individual garnishees.

John L. Sunday, trust officer of the Pioneer Trust & Savings Bank, testified that the building was occupied by the tenants; that on or about February 7, 1930, the building and real estate upon which it was situated was conveyed to the Pioneer Trust & Savings Bank, as trustee, by Kulwinsky and his wife, to secure a loan in the amount of $3,867, and that the interest of Anna Kulwinsky was assigned by her to R. M. Lovett, vice president of said bank. This assignment by Anna Kulwinsky, the wife, conveyed to the Pioneer Trust & Savings Bank, the rents issues and profits from said building as security for the loan, but reserved to herself the right to collect the rents and manage the

Opinion filed April 15, 1931

MR. CHIEF JUSTICE WILKIN delivered the opinion of the court:

The plaintiff, Service Title Bank, recovered a judgment upon a promissory note for $827 together with costs against Ann Kulwinsky in the municipal court of Chicago. Execution was issued and a garnishee summons was filed. Thereupon summons in garnishment issued against Pioneer Trust & Savings Bank, Sidney Shaenfield, Phillips Beckler, E. Goldstein, Edward E. Greenwald, J. Kirlin and Charles Czark. The individuals named as the garnishees appear to have been tenants in a certain building and the garnishment proceeding was based upon the theory that the rents owing by them were due and payable by them to Kulwinsky. Later on the Pioneer Trust & Savings Bank, a corporation, filed its intervening petition claiming the rents due in the hands of the individual garnishees.

John L. Hanley, trust officer of the Pioneer Trust & Savings Bank, testified that the building was attached by the sheriff that on or about January 7, 1930, the building and real estate upon which it was situated was conveyed to the Pioneer Trust & Savings Bank, as trustee, by Kulwinsky and his wife, to secure a loan in the amount of $3,827, and that the interest of Anna Kulwinsky was assigned by her to E. E. Lovett, vice president of said bank. This assignment by Anna Kulwinsky, the wife, conveyed to the Pioneer Trust & Savings Bank, the rents issued and profits from said building as security for the loan, but reserved to herself the right to collect the rents and manage the

property with the understanding that the surplus was to be turned over to the Pioneer Trust & Savings Bank.

The trust deed in question and the assignment of the rent were introduced in evidence and marked intervening petitioner's exhibits 1 and 2. These instruments are controlling in the decision of this case for the purpose of showing the property right of the Pioneer Trust & Savings Bank in the rents derived from the building in question and for the purpose of showing that such rents in the hands of the tenants properly belonged to the Pioneer Trust & Savings Bank. Neither of these instruments appear in the record. In view of the fact that the position of the Pioneer Trust & Savings Bank, as intervening claimant, is based upon these instruments, it was essential that they be made a part of the record and properly presented to this court. Their absence leaves only the testimony of the officers of the bank as to their contents and, from this testimony, we are of the opinion that the trial court properly found that the rents had been conveyed to the intervening claimant, Pioneer Trust & Savings Bank. In the absence of these instruments, every intendment must be found as to the correctness of the trial court who had an opportunity of reading and considering these documents.

It appears from the record that the trust deed and the assignment of rents was given prior to the obtaining of the judgment by the plaintiff against Kulwinsky in the Municipal Court. It is urged that there was no notice of the assignment placed on record, but this would not benefit the plaintiff, but might be a protection to the tenants in case they continued to pay rent to another person, other than the the assignee of the rents.

We see no reason for disturbing the judgment of the Municipal Court.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

properly with the understanding that the respondent was to be paid rent to the Pioneer Trust & Savings Bank.

The court heard in question and the assignment of the rent was introduced in evidence and marked Instruments Petitioner's exhibits 1 and 2. These instruments are controlling in the decision of this case for the purpose of showing the property right of the Pioneer Trust & Savings Bank in the rents derived from the building in question and for the purpose of showing that such rents in the hands of the tenants properly belonged to the Pioneer Trust & Savings Bank. Neither of these instruments appear in the record. In view of the fact that the position of the Pioneer Trust & Savings Bank, as intervening claimant, is based upon these instruments, it was essential that they be made a part of the record and properly presented to this court. Their absence leaves only the testimony of the officers of the bank as to their contents and, from this testimony, we are of the opinion that the trial court properly found that the rents had been pledged to the intervening claimant, Pioneer Trust & Savings Bank. In the absence of these instruments, every intendment must be found as to the correctness of the trial court who had an opportunity of reading and considering these documents.

It appears from the record that the trial court had the assignment of rents was given prior to the obtaining of the judgment by the plaintiff against Bulkmanby in the municipal court. It is urged that there was no notice of the assignment placed on record, but this would not benefit the plaintiff, but might be a protection to the tenants in case they continued to pay rent to another person, after then the assignee of the rents.

We see no reason for disturbing the judgment of the Municipal Court.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

CONCURRENT AFFIRMED.

34629

JULIUS OLF,
Appellee,
v.
APFELBAUM & STERN, INC., a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

261 I.A. 645

Opinion filed April 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Julius Olf brought his action against the defendant, Apfelbaum & Stern, Inc., in the Municipal Court for breach of contract for services, and recovered a judgment for the sum of $840, from which judgment an appeal is brought to this court. A jury was waived and the cause was heard by the court.

The action is based upon a written contract under which the defendant agreed to employ the plaintiff from December 17, 1928, to December 14, 1929, at a salary of $125 per week, and containing a clause which provided that the plaintiff "agrees to render services to the entire satisfaction" of the defendant. The written contract is short and the only reference therein made as to the services to be performed by the plaintiff is that he was engaged as a pattern maker.

Plaintiff in his testimony stated that the nature of his work was not exactly laid out; that the dresses were made by a designer and sent to him and from them he made the patterns. He stated that he had been a pattern maker for 20 years; that he immediately started to work under his agreement and continued to work for the defendant during January, February, March, April, May and June; that on one Saturday in June he had a conversation with Apfelbaum, an officer of the defendant company, at which time he, Apfelbaum, stated that he was sorry that he would have to make some changes in the business on account of business conditions. Plaintiff was discharged on or about July 1, 1929.

Opinion filed April 15, 1931

the court.

Julius Gil brought his action against the defendant, Apfelbaum & Stern, Inc., in the municipal court for breach of contract for services, and recovered a judgment for the sum of $800, from which judgment an appeal is brought to this court. A jury was waived and the cause was heard by the court.

The action is based upon a written contract under which the defendant agreed to employ the plaintiff from December 27, 1926, to December 14, 1928, at a salary of $125 per week, and containing a clause which provided that the plaintiff "agrees to devote entirely to the entire satisfaction" of the defendant. The written contract is short and the only reference therein made as to the services to be performed by the plaintiff is that he was engaged as a pattern maker.

Plaintiff in his testimony stated that the nature of his work was not exactly laid out; that the dresses were made by a designer and sent to him and from them he made the patterns. He stated that he had been a pattern maker for 20 years; that he immediately entered to work under the agreement and continued to work for the defendant during January, February, March, April, May and June; that on one Saturday in June he had a conversation with Apfelbaum, an officer of the defendant company, at which time he, Apfelbaum, stated that he was sorry that he would have to make some changes in the business on account of business conditions. Plaintiff was discharged

Apfelbaum testified that they had had complaints about material that was shipped out, because the dresses were not correctly made,- the sleeves were tight on one style and the hips were tight on another, and that some of the goods were sent back; that he told the plaintiff that unless he could do better, he could not use him. The testimony of Apfelbaum is corroborated to a certain extent by that of Steinberg, an employee of the defendant company.

The only question involved in the cause appears to be whether or not under the clause, plaintiff agrees "to render services to the entire satisfaction" of the defendant, the defendant, as employer, had a right to discharge the plaintiff without assigning any cause. It is also insisted that while there might be an exception to the rule, as where the discharge is brought about by fraud on the part of the employer, still this must be pleaded affirmatively by the employee in an action for wrongful discharge. The action, however, is one of the fourth class in the Municipal Court and the Municipal Court Act does not require the same exactitude and certainty as to the pleadings as would be required in actions of the first class or in cases in the Circuit Court. The rule in regard to the right of cancellation of contracts of this kind by the employer is stated in the case of Bishop v. Bloomington Canning Co., 307 Ill.179, as follows:

> "In discussing contracts of this nature with reference to the cancellation of the same, it is stated in 12 Corpus Juris, sec. 768, p. 673: 'Contracts in which one party agrees to perform to the satisfaction of the other are ordinarily divided into two classes: (1) where fancy, taste, sensibility or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility. In contracts involving matters of fancy, taste or judgment, when one party agrees to perform to the satisfaction of the other he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not.'
>
> From the authorities cited by counsel for both parties it seems quite clear that in construing contracts of this kind each particular case must rest on the contract as well as on the facts shown with reference thereto."

Under this decision it is apparent that it became a question for the trial court as to whether the contract in question came under enumer-

Aylesbury testified that they had had complaints about material that was stolen but, because the dresses were not marketable made,- the sleeves were tight on one style and the hips were tight on another, and that some of the goods were burnt that he said the plaintiff that unless he could do better, he could not use him. The testimony of Aylesbury is corroborated to a certain extent by that of Stainbury, an employee of the defendant company.

The only question involved in the case appears to be whether or not under the clause, plaintiff agrees "to render services to the entire satisfaction of the defendant, the defendant, as employer, had a right to discharge the plaintiff without assigning any cause. It is also insisted that while there might be an exception to the rule, as where the discharge is brought about by fraud on the part of the employer, still this must be pleaded affirmatively by the employee in an action for wrongful discharge. The action, however, is one of the first also in the municipal Court and the municipal Court does not deem not require the same amplitude and certainty as to the pleadings as would be required in actions of the first class or in cases in the circuit court. The rule in regard to the right of termination of employment of this kind by the employer is stated in the case of Pierce v. Hamilton County, 207 Ill.328, as follows:

"In discussing contracts of this nature with reference to the termination of the employment, it is stated in 17 Corpus Juris, sec. 7[illegible], p. 3[illegible]: 'Particularly in which the party agrees to perform the satisfaction of the other and additionally provides that the discharge shall be conclusive upon the parties, the employee is entitled to recover for the reasonable value of his services, and a court or jury cannot say that such party should have been satisfied whether he ought to be satisfied or not.'

From the instructions given by counsel for both parties it seems quite clear that it is essential evidence of this kind that the plaintiff must prove that the employer is well as we the facts shown with reference thereto."

Under this decision it is apparent that it becomes a question for the trial court as to whether the contract in question was under circumstances

ation (1) or (2), as laid down by the decision in the case of Bishop v. Bloomington Canning Co., supra. The trial court evidently found that it was not a contract where fancy, taste, sensibility or judgment was involved and that,,therefore, the defendant had the right to show that he was not discharged because of dissatisfaction on the part of the defendant, but that the real reason was because of a falling off of the business of the defendant corporation. This court had occasion to pass upon this question in the case of Trevellick v. Eastern Vaudeville Managers Assn., 237 Ill. App. 493. In the Trevellick case the trial court directed a verdict in favor of the defendant at the close of all the evidence and the cause was reversed on the ground that there was a question of fact which the plaintiff had a right to have a jury pass upon.

We are of the opinion that there was evidence in the case before us on the part of the plaintiff tending to support his position that his discharge was not because of dissatisfaction on the part of the defendant corporation, but for a different reason. Under such circumstances this court is bound by the finding of the trial court which had an opportunity of seeing the witnesses and hearing their testimony. It cannot be said that the finding of the trial court is manifestly against the weight of the evidence. Such being the rule it becomes the duty of tthis court to affirm the judgment of the trial court.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

ation (1) or (4), as last done by the Judicial in the case of Sharma v. Sharma Maharaj in. Appeal. The trial court rightly found that it was not a convenient place for trial, considering on judgment was involved and that, therefore, the defendant had the right to show that he was not discharged because of discriminations on the part of the defendant, but that the trial court was because of a failing all of the business of the defendant corporation. This court had occasion to pass upon this question in the case of Ramchandra v. Bombay Presidency Co. Ltd. 1. Ins. 490. In the impugned case the trial court directed a verdict in favor of the defendant at the close of all the evidence and the cause was reversed on the ground that there was a question of fact which the plaintiff had a right to have a jury pass upon.

We are of the opinion that there was evidence in the case before us on the part of the plaintiff tending to support his position that his discharge was not because of discriminations on the part of the defendants corporation, but for a different reason. Under such circumstances this court is bound by the finding of the trial court which had an opportunity of seeing the witnesses and hearing their testimony. It cannot be said that the finding of the trial court is manifestly against the weight of the evidence. Upon being the rule it becomes the duty of this court to affirm the judgment of the trial court.

For the reasons stated in this opinion, the judgment of the municipal court is affirmed.

JUDGMENT AFFIRMED.

Hunt and Fisher, JJ. Concur.

34653

ALBERT J. TERWELL,
Appellant,
v.
ORRIN EGELAND,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

261 I.A. 646

Opinion filed April 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Plaintiff, Albert J. Terwell, brought his action in assumpsit in the Municipal Court of Chicago against Helena M. Egeland, Olaf Egeland, Orrin Egeland and Martin J. Funk to recover money collected by them as rent for certain premises situated at 4246 North Tripp avenue, Chicago. The cause was dismissed as to the defendants Helena M. Egeland, Olaf Egeland and Martin J. Funk and the cause proceeded as against Orrin Egeland, as sole defendant. The cause was heard by the court without a jury and resulted in a finding in favor of the defendant, and a judgment upon the finding, from which judgment this appeal has been taken.

From the facts it appears that the premises known as 4246 North Tripp avenue, Chicago, in the year 1927, belonged to Laura Curnow and William Curnow, husband and wife.

June 3, A. D. 1927, Laura and William Curnow, husband and wife, executed their deed to said premises to one William G. Webster.

June 4, 1927, Webster executed and delivered his deed to said premises to Laura Curnow, which was not recorded until March 6, 1930.

February 11, 1930, William G. Webster issued a second deed to the plaintiff in this cause, Albert J. Terwell, which was filed of record February 13, 1930.

Opinion filed April 15, 1931

MR. PRESIDING JUSTICE FIFROM delivered the opinion of the court.

Albert J. Torrell, Sewell, Sewell and Sewell in assumpsit in the Municipal Court of Chicago against Helen M. Egeland, Olaf Egeland, Erwin Egeland and Martin J. Kunz to recover money collected by them as rent for certain premises situated at 4246 North Tripp avenue, Chicago. The cause was dismissed as to the defendants Helen M. Egeland, Olaf Egeland and Martin J. Kunz and the case proceeded as against Erwin Egeland, as sole defendant. The cause was heard by the court without a jury and resulted in a finding in favor of the defendant, and a judgment upon the finding. From which judgment this appeal has been taken.

From the facts it appears that the premises known as 4246 North Tripp avenue, Chicago, in the year 1927, belonged to Laura Dutrow and William Dutrow, husband and wife.

June 3, A. D. 1927, Laura and William Dutrow, husband and wife, executed their deed to said premises to one William G. Webster.

June 4, 1927, Webster recorded and delivered his deed to said premises to Laura Dutrow, which was not recorded until March 6, 1930.

February 11, 1930, William G. Webster issued a second deed to the plaintiff in this cause, Albert J. Torrell, which was filed of record February 12, 1930.

January 1927, Laura Curnow left the premises at 4246 North Tripp avenue, and from that time on the premises were continuously rented to tenants and the rents collected by Orrin Egeland, the defendant, as agent for Laura Curnow.

Laura Curnow testified that Egeland had been taking care of the property and collecting the rents for her as her agent. Some objection was made as to the competency of the proof of agency, but we do not believe the objection was well taken.

Plaintiff did not appear or testify in the proceeding, but an affidavit was introduced in evidence showing that the original deed of February 11, 1930, from Webster to plaintiff was lost and a certified copy was offered and received in evidence. The description in the deed does not correspond with the other deeds in evidence, nor does it locate the property in the correct section and, if it were not for the street number shown in the deed, the property could not be located by the instrument. No other evidence was offered on behalf of the plaintiff who stood upon his title of record.

The deed from Laura Curnow and her husband to William G. Webster, bearing date of June 3, 1927, was introduced in evidence, together with the deed from Webster back to her, dated June 4, 1927.

There is nothing in the record showing that the plaintiff made any inquiry of the tenants on the premises as to their rights, nor to whom they were paying rent, nor from whom they leased the premises occupied by them.

The evident purpose of the transfer of Laura Curnow and her husband to Webster and from Webster back to her, was to place the title in her, and the temporary title in Webster was evidently that of trustee, for the sole purpose of clearing the chain of title.

The consideration named in the deed from Webster to Terwell is given as $10 and other good and valuable consideration. There is no testimony in the record as to what the real, if any, consideration was.

January 1917, James Dawson left the premises of Mrs. Ruth Tylor forever, and from that time on the premises were continuously rented to tenants and the rents collected by Curtis Ingland, the defendant, as agent for owner.

James Dawson testified that Ingland had been taking care of the property and collecting the rents for her as her agent. Same objection was made as to the competency of the final of agency, and we do not believe the objection was well taken.

Plaintiff did not appear at trial in the proceeding, but an affidavit was introduced in evidence showing that the original deed of trustee in, 1907, from mother to plaintiff was lost and a certified copy was offered and received in evidence. The description in the deed does not correspond with the other deeds introduced, nor does it look to the property in the correct section and, if it were not for the street number shown in the deed, the property could not be located by the instrument. No other evidence was offered to show title of the plaintiff who stood upon his title of record.

The deed from James Dawson and her husband to William G. Webster, bearing date of June 5, 1907, was introduced in evidence, together with the deed from Webster back to her, dated June 6, 1907. There is nothing in the record showing that the plaintiff made any inquiry of the tenants in the premises as to their rights, nor to whom they were paying rent, nor from whom they leased the premises occupied by them.

The evident purpose of the transfer of James Dawson and her husband to Webster and from Webster back to her, was to place the title in her, and the temporary title in Webster was evidently that of trustee, for the sole purpose of clearing the chain of title.

The consideration named in the deed from Webster to Tagwell is given as $10 and other good and valuable consideration. There is no testimony in the record as to what the real, if any, consideration was.

We believe the trial court properly found in favor of the defendant. The rule in this state appears to be clear that the occupation of premises by a tenant amounts to notice to a purchaser of rights of which he, the purchaser, should apprise himself. Possession by the owner would defeat a deed, even though the owner was occupying under an unrecorded deed of conveyance. Occupation by the tenant of an owner under an unrecorded deed, also amounts to constructive notice to a purchaser. This occupation puts the burden upon the purchaser of making inquiry as to the rights of the tenant and the landlord under whom the tenant holds. Gallagher v. Northrup, 215 Ill. 563; German-American Bank v. Martin, 277 Ill. 629; Atwood v. C. M. & St. P. Ry. Co., 313 Ill. 58. In any event, we can see no right of action against the defendant in this case. He was acting as an agent for a disclosed principal; he made no claim to the property himself, but collected the rents for the landlord and the owner of the premises, Laura Curnow. It is not a case of undisclosed principal. Moreover, the plaintiff had no dealings with him, under which plaintiff could claim that he considered him the principal in the cause.

The action was heard by the court without a jury and it is presumed that only such evidence as was material was considered by the court. Consequently, there is no force in the argument that certain evidence was improperly admitted. There was sufficient competent evidence upon which the court could enter its finding and judgment. We find no reversible error in the proceeding, and, therefore, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ., CONCUR.

We believe the trial court properly found in favor of the defendant. The rule in this state appears to be clear that the conveyance of premises by a tenant amounts to notice to a purchaser of rights of which he, the purchaser, should exercise diligent possession by the owner would defeat a bona, even though the owner has neglected under an unrecorded deed of conveyance. Possession by the tenant if he owns under an unrecorded deed, also results to constructive notice to a purchaser. This determination puts the burden upon the purchaser of making inquiry as to the rights of the tenant and the landlord under the tenant claim. Hilliard v. Griffith, 119 Ill. 383; Commercial Bank v. Griffin, 277 Ill. 498; Jones v. L. A. Ft. L. Co., 313 Ill. 64. In any event, we can see no right of action against the defendant in this case. He was acting as an agent for a disclosed principal, he made no claim to the property himself, but indicated the terms for the landlord and the amount of the premium, into Tuman. It is not a case of undisclosed principal. However, the plaintiff had no dealings with him, under which plaintiff could claim that he constituted him the principal in the case.

The action was heard by the court without a jury and it is presumed that such evidence as was material was considered by the court. Incidentally, there is mentioned in the argument that certain evidence was improperly admitted. There was sufficient competent evidence upon which the court could enter its finding and judgment. We find no reversible error in the proceeding, and, therefore, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

MURPHY and WILSON, JJ., concur.

34409

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THE FOREMAN TRUST AND SAVINGS BANK, Administrator of the Estate of Ralph Yushka, Deceased, Appellee, v. SOUTH SUBURBAN MOTOR COACH COMPANY, a Corporation, Appellant.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

261 I.A. 646[2]

Opinion filed April 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

The Foreman Trust and Savings Bank, as administrator of the estate of Ralph Yushka, deceased, brought suit in the Superior Court of Cook County against defendant to recover damages resulting from an accident which occurred on January 9, 1928, when one of the defendant's busses ran into Ralph Yushka causing injuries to him which resulted in his death. Trial was had by jury resulting in a verdict in favor of plaintiff for $5,000 upon which the court entered judgment.

The declaration originally consisted of three counts, the third of which, alleging wilfulness and wantoness on the part of defendant, was withdrawn at the close of plaintiff's case. The first of the remaining counts charged defendant with negligence in the management and operation of its bus; the second count alleged that while plaintiff's intestate, in the exercise of due care, was walking on Page Avenue in the City of Harvey, at or near the intersection of 153rd street, defendant negligently drove, managed and operated its motor bus at a rate of speed much greater than was consistent with the safety of persons upon the street, to-wit, at the rate of twenty-five miles per hour. To these counts the defendant pleaded the general issue.

The essential facts disclose that on the night of the

Opinion filed April 18, 1921.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Lawson Trust and Savings Bank, as administrator of the estate of Ralph Buckle, deceased, brought suit in the Superior Court of Cook County against Elmhurst to recover damages resulting from an accident which occurred on January 8, 1918, when one of the defendant's busses ran into Ralph Buckle causing injuries to him which resulted in his death. Trial was had by jury resulting in a verdict in favor of plaintiff for $3,000 upon which the court entered judgment.

The declaration originally consisted of three counts, the third of which, alleging willfulness and wantonness on the part of defendant, was withdrawn at the close of plaintiff's case. The first of the remaining counts charged defendant with negligence in the management and operation of its bus; the second count alleged that while plaintiff's intestate, in the exercise of due care, was walking on Page Avenue in the city of Harvey, at or near the intersection of 153rd street, defendant negligently drove, managed and operated its motor bus at a rate of speed much greater than was consistent with the safety of persons upon the street, to-wit, at the rate of twenty-five miles per hour. To these counts the defendant pleaded the general issue.

The essential facts disclose that on the night of the

accident defendant was driving its bus in a southerly direction on Page Avenue in the City of Harvey and the accident occurred between 153rd and 154th streets; that the north part of this block on the east side of Page Avenue was vacant and there was a well travelled diagonal path extending across the corner of this lot from the northeast to the southwest coming into Page Avenue about 150 feet south of 153rd street; that there was no sidewalk on the east side of Page avenue, but there was one on the other side of the street; that about ten o'clock of the evening in question Ralph Yushka, plaintiff's intestate, a man fifty-one years of age, was walking southwest along this pathway to the point where it intersects Page Avenue and then diagonally across the street, evidently intending to continue south along this walk on the west side of Page Avenue; that when he had almost reached the curb on the west side of the street he was struck by defendant's bus and instantly killed.

Walter E. Collins, a witness for plaintiff, testified that he lived about two blocks from the place of the accident and was proceeding on his way home from work, walking north on thewest side of Page Avenue; that he saw Yushka walking southwest along the path referred to; that he saw the bus coming from the north, being driven at a rather rapid rate of speed over the icy pavement; that the bus passed Collins just before he got to 153rd street; that after the bus had passed him he heard the sound of the horn and turned around; that Yushka had passed in front of the bus, as it appeared to the witness, and was just getting up to the curb when the bus turned or swayed to the right or west coming almost to the curb, skidded and stopped in an east and west position across the street with its front end pointing either directly west or a little to the northwest.

Three Wojciechowski children, Henry twelve, Josephine sixteen and Rose fifteen, testified that their father and mother

accident defendant was driving its bus in a southerly direction on Page Avenue in the city of Saint Louis and the accident occurred between 12th and 13th streets; that the north part of this block on the east side of Page Avenue was vacant and there was a well travelled diagonal path extending across the corner of this lot from the northeast to the southwest coming into Page Avenue about 120 feet south of 12th street; that there was no sidewalk on the east side of Page avenue, but there was one on the other side of the street; that about ten o'clock of the evening in question Ralph Tucker, plaintiff's intestate, a man fifty-one years of age, was walking southwest along this diagonal to the point where it intersects Page avenue and then diagonally across the street, evidently intending to continue south along this side on the west side of Page Avenue; that when he had almost reached the curb on the west side of the street he was struck by defendant's bus and instantly killed.

Walter H. Goulding, a witness for plaintiff, testified that he lived about two blocks from the place of the accident and was preparing to go to his home from work, walking north on the west side of Page Avenue; that he was walking southwest along the path referred to; that he saw the car coming from the north, being driven at a rather rapid rate of speed over the icy pavement; that the car passed Walnut Park before he got to Page avenue; that after the car had passed him he heard the sound of the horn and turned around; that Tucker had passed in front of the car, as it appeared to the witness, and was just getting up to the curb when the bus turned or swerved to the right or west coming almost to the curb, skidded and stopped in an east and west position across the street with its front end pointing either directly west or a little to the southwest.

Three neighborhood children, Henry Davis, Joseph Hixson and Jose Irlson, testified that their father and mother

were away from home at the time of the accident and they were looking out of the front window awaiting their return. Their testimony is substantially alike. They testified that Yushka was crossing the street from the east to the west in a diagonal southwesterly direction; that he was running at first and then walked rapidly, staggering "a little bit"; that he passed in front of the bus and was struck four or five feet from the west curb. None of the children could estimate the speed of the bus, and all of them testified that its head lights and lights inside the bus were burning brightly; that just prior to the accident the horn of the bus sounded and the bus turned to the left and that Yushka was struck by the right front bumper of the bus and thrown near the curb.

On behalf of defendant Hans Fitschen testified that he was walking home at the time of the accident, proceeding north on Page Avenue between 153rd and 154th streets on the west side of the street; that he first saw the bus coming from the north at about 148th street, four or five blocks north; that it had two head lights and a couple of green lights on top of the bus and the whole body of the bus was lit up inside; that he saw another man, presumably Yushka, on the east side of Page Avenue "walking kind of staggery like in the road," running a little and walking rapidly as he crossed; that as soon as the witness got past Yushka he paid no further attention to him; that the next thing to attract his attention was the squeeking of the brakes and the sounding of the horn; that he thereupon looked around and seeing the bus standing there went back; that he saw the man lying on the street behind the bus, with the bus standing crossways on the street with the front end facing west pretty close to the curb; that he did not see anybody else on the west side of the street and no one passed him going in either direction.

Fred K. Hassfeld testified on behalf of defendant that he was the driver of the bus when the accident occurred; that Page

were away from home at the time of the accident and they were leaving out of the front window awaiting their return. Their testimony is substantially alike. They testified that Turbin was crossing the street from the east to the west in a diagonal southwesterly direction; that he was running at fast and not moderate speed, shouting "a little bit"; that he passed in front of the bus and was struck four or five feet from the west curb. None of the children could estimate the speed of the bus, and all of them testified that its head lights and light inside the car were burning; that just prior to the accident the horn of the bus sounded and the bus turned to the left and that Turbin was struck by the right front bumper of the bus and thrown near the curb.

On behalf of defendant Hans Stephen testified that he was waiting home at the time of the accident, approaching on Hoge Avenue between 163rd and 164th streets on the west side of the street; that he first saw the bus coming from the north at about 164th street, four or five blocks north; that it had the head lights and a couple of green lights on top of the bus and the whole body of the bus was lit up inside; that he saw another man, presumably Hanks, on the east side of Hoge Avenue "walking kind of staggery like in the road," running a little and walking rapidly as he crossed; that as soon as the witness got west Hanks he paid no further attention to him; that the next thing to attract his attention was the squealing of the brakes and the sounding of the horn; that he thereupon looked around and seeing the bus standing there went back; that he saw the man lying on the street behind the bus, with the bus standing somewhere on the street with the front and facing west pretty close to the curb; that he did not see anybody else on the west side of the street and no one passed him going in either direction.

Fred A. Hoerlein testified on behalf of defendant that he was the driver of the bus when the accident occurred; that Hoge

Avenue is about forty feet wide between 153rd and 154thstreets and had a double car track in the middle of the street; that there was a brick pavement between the car tracks and cement pavement on both sides of the track; that the roadway was hard, crusted with snow and ice and very slippery; that he was driving along the west or right hand of the street; that the road was rutty on both sides where vehicles had found it easiest to go through, close to the curb; that his head lights were burning brightly and the green marker lights and dome lights inside the bus were also lit; that his head lights were very bright and he could see half the width of the street for a considerable distance ahead probably half a block; that the first thing he knew Yushka crossed in front of him diagonally in a south-westerly direction; that he first saw him about five feet in front of the bus and two feet to the left; that the first thing he did was to blow his horn and put on his brakes; that Yushka was trying to go across in front of the bus when the witness turned to the right not more than one foot, then turned to the left, applied his brakes and finally stopped the bus beyond the point where Yushka was struck; that when the bus came to a stop it was facing west with the rear and toward the east.

By means of questions suggesting to several witnesses that Yushka "staggered" as he crossed the street it was sought to show that he was intoxicated, but there is no direct evidence to sustain the contention and the suggestion of intoxication is refuted by the testimony of one John Metz, an undertaker and reserve police officer in the City of Harvey, who was called to the scene of the accident immediately after it happened, made a close examination of the deceased to determine whether he was still alive, and testified that he did not detect any odor or other evidence of liquor. Considering the crusty and icy condition of the street with ruts worn on both sides of the car track by the passing traffic, it is not unlikely that the

street in about fifty feet with between lights and intersections and had a double car track in the middle of the street; that there was a brick pavement between the car tracks and cement pavement on both sides of the track; that the roadway was broad, crowded with cars and was very slippery; that he was driving along the west or right hand of the street; that the road was fairly on both sides where vehicles had found it smoother to go through; that in the dark the red lights were dazzling brightly and the green motor lights and head lights inside the bus were also; that the head lights were very bright and he could see half the width of the street for a considerable distance when passing half a block; that the first thing he knew Yuebbe crossed in front of him diagonally in a south-westerly direction; that he first saw him about five feet in front of the bus and two feet to the left; that the first thing he did was to blow his horn and put on his brakes; that Yuebbe was trying to go across in front of the bus when the witness turned to the right and were then one foot, then turned to the left, applied his brake and finally stopped the bus beyond the point where Yuebbe was struck; that when the bus came to a stop it was facing west with the rear and toward the east.

By means of questions suggesting to several witnesses that Yuebbe "staggered" as he crossed the street it was sought to show that he was intoxicated, but there is no direct evidence to sustain the contention and the suggestion of intoxication is refuted by the testimony of one John Doe, an undertaker and reserve police officer in the city of Harvey, who was called to the scene of the accident immediately after it happened, made a close examination of the deceased to determine whether he was still alive, and testified that he did not detect any odor or other evidence of liquor. Considering the crowd and the condition of the street with ruts worn on both sides of the car track by the passing traffic, it is not unlikely that the

appearance of staggering was due to the fact that Yushka picked his way over the icy pavement as he hurried across.

It is conceded that the bus was well lighted and that the deceased probably saw it approaching at a considerable distance. However, when he started to cross the street he apparently thought the bus was a sufficient distance away to give him ample opportunity to cross the street in safety, and his judgment in this regard is corroborated by some of the witnesses who testified that he had passed in front of the bus and reached a position of safety when the bus swerved to the right and struck him. It is urged by plaintiff that the driver was negligent in proceeding at an excessive rate of speed upon the icy pavement and in turning the bus to the right out of the line of travel after Yushka had already passed in front of it. The liability of defendant rests largely upon these close questions of fact. Collins testified that the bus swerved to the right when, as it appeared to him, Yushka had already reached the curb, and Hassfeld, the driver, corroborated this testimony by admitting that he turned to the right, but stated that he turned only about one foot. It appears reasonably clear from the evidence that there was a sudden turn toward the deceased just before he was struck and that he was struck by the extreme right front part of the bus. The question of degree and whether this turn was the proximate cause of the accident were questions of fact for the jury to determine.

It is undoubtedly the duty of this court to determine whether or not the verdict is justified by the evidence, but we will not disturb the verdict on a question of fact unless we can say from an examination of the record that the verdict is clearly and manifestly against the weight of the evidence. The jury heard the witnesses and had an opportunity to determine their credibility and reliability by recognized tests submitted by the instructions of the court, and upon a close question this court will not substitute its

significance of stumbling one has on the floor that Thomas placed his way over the log pavement on the burning morrow.

It is conceded that the bus was well lighted and that the deceased probably saw it approaching at a considerable distance. However, when he arrived to cross the street he evidently thought the bus was a sufficient distance away to give the single co-ordinate to cross the street in safety, and his judgment in this regard is corroborated by some of the witnesses who testified that he had passed in front of the bus and reached a position of safety when the bus neared to the right and struck him. It is urged by plaintiff that the driver was negligent in proceeding at an excessive rate of speed upon the log pavement and in turning the bus to the right out of the line of travel after Thomas had already passed in front of it. The liability of defendant rests largely upon these close questions of fact. Witnesses testified that the bus neared to the right when he it approached to the, Thomas had already reached the curb, and Bassett, the driver, corroborated this testimony by admitting that he turned to the right, but stated that he turned only about one foot. It appears reasonably clear from the evidence that there was a sudden turn toward the deceased just before he was struck and that he was struck by the extreme right front part of the bus. The question of degree and whether this turn was the proximate cause of the accident were questions of fact for the jury to determine.

It is undoubtedly the duty of this court to determine whether or not the verdict is justified by the evidence, but we will not disturb the verdict on a question of fact unless we can say from an examination of the record that the verdict is clearly and manifestly against the weight of the evidence. The jury heard the witnesses and had an opportunity to determine their credibility and reliability by recognized tests submitted by the instructions of the court, and upon a close inspection this court will not substitute its

judgment for that of the jury, whose duty it was to determine the facts in the case.

Defendant complains of instructions one and eight, given on behalf of plaintiff. Instruction one, in the very form submitted by the trial court, was approved by the Supreme Court in Deming v. City of Chicago, 321 Ill. 341.

Instruction eight is as follows:

> "You are instructed, as a matter of law, that the deceased, Ralph Yushka, had the right to cross the public highway at any place in the public highway provided he used ordinary care for his own safety in so doing."

Defendant contends that the failure of the court to tell the jury that "the ordinary care referred to must be used prior to, as well as at the time of the instant of the accident", rendered the instruction erroneous. We cannot agree with this criticism. The legal proposition contained in this instruction is sound, and the provision as to ordinary care could mean nothing else than that the deceased was bound to use ordinary care for his own safety during the whole time that he was crossing the highway.

There remains only the objection that the verdict is excessive. Yushka was but fifty-one years of age, was in good health, and left him surviving three daughters, the youngest of whom, aged sixteen, was dependent upon him for support. Under the circumstances we do not regard the verdict as at all excessive.

For the reasons stated the judgment of the Superior Court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

judgment for that of the jury, where duty it was to determine the facts in the case.

Defendant complains of instructions one and eight, given on behalf of plaintiff. Instruction one, in the very form complained of by the trial court, was approved by the Supreme Court in Kenney v. City of Salem, 181 Ill. 311.

Instruction eight is as follows:

"You are instructed, as a matter of law, that the deceased, Julia Tuohy, had the right to cross the public highway at any place in the public highway provided he used ordinary care for his own safety in so doing."

Defendant concedes that the failure of the court to tell the jury that "the pedestrian must exercise as much care for his own safety, as will be at the time of the instant of the accident", rendered the instruction erroneous. We cannot agree with this criticism. The legal proposition contained in this instruction is sound, and the provision as to ordinary care would seem sufficient also that the deceased was bound to use ordinary care for his own safety during the whole time that he was crossing the highway.

There remains only the objection that the verdict is excessive. Julia was but fifteen years of age, was in good health, and left him surviving three daughters, the youngest of whom, aged sixteen, was dependent upon him for support. Under the circumstances we do not regard the verdict as at all excessive.

For the reasons stated the judgment of the Superior Court will be affirmed.

AFFIRMED.

WILSON, P.J. AND DEAN, J. CONCUR.

34424

ELNA SAMUELSON,
Appellee,
v.
CITY OF CHICAGO,
A Municipal Corporation.
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

Opinion filed April 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

This is an action on the case, brought in the Superior Court of Cook County by Elna Samuelson, plaintiff, against the City of Chicago, defendant, for personal injuries sustained by her while riding as a passenger in an automobile driven by her husband on a public highway in the City of Chicago. The jury rendered a verdict for plaintiff in the sum of $5,000, upon which the court entered judgment. This appeal is prosecuted to reverse that judgment.

The declaration consists of two counts. The first count alleges that plaintiff, while a passenger in a certain automobile, was at all times in the exercise of due and ordinary care, and that the defendant negligently and carelessly permitted the street to become and remain in an unsafe and dangerous condition, in direct consequence of which plaintiff sustained injuries. The second count adopts portions of the first and alleges in addition thereto that it was the duty of defendant to exercise ordinary care and caution to maintain said highway in a reasonably safe condition; that defendant knew or by the exercise of ordinary care could have known that said highway was in a state of disrepair, and that said unsafe and dangerous condition existed for a long period of time prior to the accident, but that defendant nevertheless negligently failed to make proper and sufficient repairs upon said highway in consequence of which plaintiff was injured.

STATE

EARL SAMPSON,

Appellee,

v.

CITY OF CHICAGO,

A Municipal Corporation,

Appellant.

Opinion Filed April 19, 1948

Mr. Justice Fulton delivered the opinion of the court:

This is an action on the case, brought in the Superior Court of Cook County by Earl Sampson, plaintiff, against the City of Chicago, defendant, for personal injuries sustained by his while riding as a passenger in an automobile driven by her husband on a public highway in the City of Chicago. The jury rendered a verdict for plaintiff in the sum of $[illegible], upon which the court entered judgment. This appeal is prosecuted to reverse that judgment.

The declaration consists of two counts. The first count alleges that plaintiff, while a passenger in a certain automobile, was at all times in the exercise of due and ordinary care, and that the defendant negligently and carelessly permitted the street to become and remain in an unsafe and dangerous condition, in disregard of which condition the said automobile injured. The second count adopts portions of the first and alleges in addition thereto that it was the duty of defendant to exercise ordinary care and caution to maintain said highway in a reasonably safe condition; that defendant knew or by the exercise of ordinary care could have known that said highway was in a state of disrepair, and that said hazards and dangerous condition existed for a long period of time prior to the accident, but that defendant nevertheless negligently failed to make proper and sufficient repairs upon said highway in consequence of which plaintiff was injured.

The essential facts are disclosed by the testimony of various witnesses. Gustave R. Samueleon, the husband of the plaintiff, testified that on May 24, 1928, the evening of the accident, he and his wife were driving toward their home in a southerly direction on State Street, in the City of Chicago; that this route took them underneath the viaduct which runs between 30th and 31st streets, crossing State Street at approximately right angles; that he was driving a Chevrolet Coach with a left hand drive and his wife, the plaintiff, was sitting in the front seat to his right; that he had the usual dimmer lights on as required for city driving, and could discern the viaduct about half a block ahead; that his lights were focused up over the pavement so he could not distinguish anything below there as he went over the top of the incline which leads down under neath the viaduct; that as he reached this incline underneath the viaduct he struck a hole in the pavement and something snapped on the car, making it impossible for him to turn the wheels, as a result of which the car ran straight into one of the posts of the viaduct; that as the car hit the viaduct pillar both he and his wife slid forward, his nose was broken and badly cut and his wife's leg was broken and smashed; that this was the first time either he or his wife had driven over this part of State Street in their automobile for at least a year, and neither of them knew of the existence of the hole in the pavement; that three days after the accident he measured the hole and found that it averaged from the smallest to the deepest part all the way from six to nine inches in depth, was approximately three feet wide and six feet long, and that the two front wheels of the car would fit in there nicely; that the viaduct runs east and west across State Street, which runs in a northerly and southerly direction, and as you pass under it there is a car track running underneath it on each side of the pillars; that the witness was travelling just to the right or west of the southbound car track, and the street slopes down gradually just before you approach the

The essential facts are disclosed by the testimony of various witnesses. Mortgage T. Gunderson, the husband of the plaintiff, testified that on May 24, 1929, the evening of the accident, he and his wife were driving toward their home in a southerly direction on State Street, in the City of Chicago; that this route took them underneath the viaduct which runs between 40th and 41st streets, crossing State Street at approximately right angles; that he was driving a Chevrolet Coach with a left hand drive and his wife, the plaintiff, was sitting in the front seat to his right; that he had the usual dimmer lights on as required for city driving, and could discern the viaduct even with a bright object; that his lights were focused up over the pavement so he could not distinguish anything below there as he went over the top of the incline which leads down under neath the viaduct; that as he reached this incline underneath the viaduct he struck a hole in the pavement and something snapped on the car, making it impossible for him to turn the wheels, as a result of which the car ran straight into one of the posts of the viaduct; that as the car hit the viaduct pillar both he and his wife sick forward, his nose was broken and badly cut and his wife's leg was broken and swollen; that this was the first time either he or his wife had driven over this part of State Street in their automobile for at least a year, and neither of them knew of the existence of the hole in the pavement; that three days after the accident he measured the hole and found that it averaged from the smallest to the largest part all the way from six to nine inches in depth, was approximately three feet wide and six feet long, and that the two front wheels of the car would fit in there nicely; that the viaduct runs east and west across State Street, which runs in a northerly and southerly direction, and as you pass under it there is a car track running underneath it on each side of the pillars; that the witness was travelling just to the right or west of the southbound car track, and the street sloped down gradually that before you reached the

the level under the viaduct. Mr. Samuelson described the condition of the pavement at that point as he saw it several days after the accident by stating "there are holes under there I could hide in". He testified further that the street at that point was not very well lit up and the lights under the viaduct were quite dim; that the pillars are approximately eight feet apart, and that he struck either the first or second column.

The plaintiff testified that they were travelling at a moderate rate of speed, the weather was clear and the street dry, and she could see the viaduct about half a block ahead; that as they approached the viaduct the lights were above the street level and as they drove down the slope they struck the hole; that she did not see the hole before the machine hit it and there was nothing there to give her warning of the existence of the hole in the street; that before they struck the hole the pavement had been in excellent condition; that she was looking straight ahead at all times and when the automobile struck the hole she was thrown forward against the dashboard with both knees and the next thing she knew some one was placing her into an automobile and taking her to the hospital.

Gerard Cawley, a witness for plaintiff, testified that he had followed Samuelson's automobile for about three or four blocks before the accident; that at the time of the crash he was approximately a block and a half behind them; that he could see their tail light, heard the crash, kept on going and stopped about the middle of the viaduct in order to help Mrs. Samuelson; that when he arrived there they were both still in the car, which was practically wrapped right around the first column of the viaduct, and that he took both of them to a hospital. The witness described the scene of the accident by stating that "as you drive south approaching the viaduct State Street has a cement pavement;" that at the beginning of

the least under the circumstances. Mr. Donnelson examined the condition of the pavement at that point so he was in several days after the accident by stating "there was quite water there; I could see for, in addition further down the street or less place was not very well lit up and the lights under the viaduct were quite dim; that the pillars are alternately eight feet apart, not that on either side the first or second column.

The plaintiff testified that they were travelling at a moderate rate of speed. The weather was dark and the street dry, and she could see the viaduct about half a block ahead; that as they approached the viaduct the lights were above the street level and as they drove down the slope they struck the hole; that she did not see the hole before; the moonlight did it and there was nothing there to give her warning of the existence of the hole in the street; that before they struck the hole the pavement had been in excellent condition; that she was looking straight ahead at all times and when the automobile struck the hole she was thrown forward striking the windscreen with both knees and the next thing she knew she was sitting for left on pavement and taking her to the hospital.

Ernest Dooley, a witness for plaintiff, testified that he had followed Donnelson's automobile for about three or four blocks before the accident; that at the time of the crash he was approximately a block and a half behind them; that he could see their tail light, being the crash, kept on going and stopped about the middle of the viaduct in order to help Mrs. Donnelson; that when he arrived there they were both still in the car, which was practically wrapped right around the first column of the viaduct, and that he took both of them to a hospital. The witness described the scene of the accident by stating that "as you drive south approaching the viaduct there first has a cement pavement" that at the beginning of

the grade where the street goes down underneath the viaduct the pavement is brick for about five or six feet north of the viaduct; that the hole into which the Samuelsons drove is located at the place just where the incline slopes down underneath the viaduct, is about five or six inches deep and runs straight down into the viaduct.

John Molen, a witness for plaintiff, testified as to the defective condition of the street at this point. He stated that he had been over State Street at the place of the accident during the years 1927 and 1928, and was familiar with the viaduct in question; that there was a big hole between the street car track and the west curb about ten or fifteen feet north of the viaduct, approximately six inches deep and three feet wide; that the hole was placed in such a position that it would be difficult to see until you were on top of it; that the hole in the street and the condition it was in at the time of the accident was in existence for about four or five months prior to May 1928.

Another witness for plaintiff M. E. Stephens, testified that at the time of the accident he lived at 10215 South May Street and had occasion to use State Street regularly every night and morning; that as you approach the viaduct from the north the street is quite on a slant or down grade; that there were good sized ruts where the bricks had sunk during the frosts and the thaws between the street car track and the curb, and that this condition had existed for more than six months prior to May 1928; that outside of the viaduct and about 200 feet north of it there was one street light and only two lights under the viaduct, which was about 200 feet long.

With reference to the condition of the pavement, William Krause, a police officer, and William Cahill, his partner, both testified that they looked at the highway but did not see any hole there such as Mr. Samuelson and other witnesses described.

the crack where the street met the sidewalk by the viaduct it
remained in which for about five or six feet north of the viaduct;
that the hole into which the Simmons drove is located at the place
just where the lattice work has deteriorated the viaduct, is about
five or six inches deep and runs straight down into the viaduct.

John Quinn, a witness for plaintiff, testified on to the
defective condition of the street at this point. He stated that he
had been over 20th Street at the place of the accident during the
year 1917 and 1918, and was familiar with the viaduct in question;
that there was a big hole between the street car track and the west
curb about ten or fifteen feet south of the viaduct, approximately
six inches deep and three feet wide; that the hole was placed in such
a position that it would be difficult to see until you were on top of
it; that the hole in the street and the condition it was in at the
time of the accident was in existence for about four or five months
prior to July 1918.

Another witness for plaintiff R. E. Stephens, testified
that at the time of the accident he lived at 1718 South 20th Street
and had occasion to use 20th Street regularly every night and morning;
that as you approached the viaduct from the north the street is quite
on a slant or down grade; that there were good sized rutts there the
bricks had sunk during the travel and the space between the street car
track and the curb, and that this condition had existed for more than
six months prior to July 1918; that outside of the viaduct and about
200 feet north of it there was one street light and only two lights
under the viaduct, which was about 300 feet long.

With reference to the condition of the pavement, William
Crane, a police officer, and William Gaskin, his partner, both
testified that they looked at the highway but did not see any hole
there such as Mr. Simmons and other witnesses described.

John A. Turick, also a police officer, testified that in May 1928, he was assigned to the motorcycle service and frequently passed under the viaduct in question; that there was no such hole in the pavement as described by plaintiff's witnesses; that he did remember a depression in the street about fifty feet north of the viaduct where the pavement was far from being smooth, but he could not say there were depressions six inches deep because he had never measured them. The witness testified that he always rode the car tracks underneath the viaduct and did not ride to the right of the car tracks at the place where the accident occurred.

John J. Guiltanane, another police officer called by the city, testified that there were holes underneath the viaduct but was unable to describe just where they were located and could not remember having seen any hole like the one testified to by plaintiff's witnesses.

William Danz, also a police officer, testified on behalf of the city that he did not remember the kind of hole designated by plaintiff's witnesses, and characterized the pavement as "wavey".

On the question of damages Dr. William A. Diffenbaugh, a physician attending the plaintiff, testified that she suffered compoundfractures of the left tibia and left fibula; that the bones were badly splintered and so broken that they had to be wired into place; that he was required to make an incision in order to bring the bones to the surface, drill holes into the bone in both ends and put a wire through and draw the fragments together, and in order to do this it was necessary for him to cut through the muscles and flesh.

Plaintiff was first taken to the Roseland Community Hospital where she remained for two or three days, and then removed to the Auburn Park Hospital, where she remained for a month, after which she was taken to her home and treated there for some time.

John A. Torino, also a police officer, testified that in May 1958, he was assigned to the motorcycle service and frequently passed under the viaduct in question; that there was no such hole in the pavement as described by plaintiff's witnesses; that he did remember a depression in the street about fifty feet north of the viaduct where the pavement was far from being smooth, but he could not say that there was depressions six inches deep because he had never measured them. The witness testified that he always took the car through underneath the viaduct and did not ride to the right of the car straight if the place where the accident occurred.

John D. Bellisano, another police officer called by the city, testified that there were holes underneath the viaduct but was unable to describe just where they were located and could not remember having seen any hole like the one testified to by plaintiff's witnesses.

William Dunn, also a police officer, testified on behalf of the city that he did not remember the item as being described by plaintiff's witnesses, and characterized the pavement as "navvy".

On the question of damages Dr. William A. Bittenbaugh, a physician attending the plaintiff, testified that she suffered compound fractures of the left tibia and left fibula; that the bones were badly splintered and so broken that they had to be wired into place; that he was required to make an incision in order to bring the bones to the surface, drill holes into the bone in both ends and put a wire through and hook the fragments together, and in order to do this it was necessary for him to cut through the muscles and flesh.

Plaintiff was first taken to the Rockland Community Hospital where she remained for two or three days, but then removed to the Hudson Park Hospital, where she remained for a month, after which she was taken to her home and treated there for some time.

She testified that she suffered so much pain that she had to be taken back to the hospital again, after being removed to her home, where another operation was performed. The hospital bill was $600 and Dr. Siffenbaugh's bill amounted to $1,000.

The evidence further discloses that plaintiff's leg is scarred from the knee down to the ankle, and that at the time of the second operation she was in the hospital about eight weeks, and that she now walks with a decided limp, and suffers great pain when she is required to be on her feet for any length of time.

As grounds for reversal defendant makes three principle contentions, namely, (1) that there was no defect in the pavement as contended for by plaintiff; (2) that the accident did not happen in the manner described by Samuelson and his wife, and (3) that plaintiff was guilty of contributory negligence.

With reference to the first contention the foregoing summary of testimony constitutes all of the evidence in the case. Six witnesses testified for plaintiff as to the defective condition of the pavement, four of whom were entirely disinterested. Five witnesses, all police officers of the City of Chicago, testified for defendant. There is thus presented a sharp conflict in the evidence as to the condition and extent of the defects in the pavement approaching the viaduct. The jury heard these witnesses, had an opportunity to observe their demeanor on the witness stand, and to judge their credibility by tests submitted to them under instructions of the court, and it was the function of the jury to determine this important question of fact.

With reference to the second contention, it is urged by defendant that the position of the wrecked automobile immediately after the accident indicates that plaintiff was not proceeding south on the west side of State Street, but was "straddling" the rails between

the testified that she believes he took pain that she had to be taken back to the hospital right, after being treated in his home, where medical operations was performed. The hospital bill was $800 and Dr. Glickenhouse's bill amounted to $1,500.

The witness further testified that plaintiff's leg is shorted from the knee down on the right, and that as the time of the second operation she was in the hospital about eight weeks, and that she now walks with a crooked limp, and suffers great pain when she is required to be on her feet for any length of time.

In regards the numerous defendant makes three principle contentions, namely, (1) that there was no duty in the premises as contended for by plaintiff; (2) that the accident did not happen in the manner described by witnesses and his wife, and (3) that plaintiff was guilty of contributory negligence.

With reference to the first contention the following summary of testimony constitutes all of the evidence in the case. Six witnesses testified for plaintiff as to the defective condition of the pavement, four of them were entirely disinterested. Five witnesses, all police officers of the city of Chicago, testified for defendant. There is thus presented a sharp conflict in the evidence as to the condition and nature of the defects in the pavement adjoining the viaduct. The jury heard those witnesses, had an opportunity to observe their demeanor on the witness stand, and to judge their credibility by tests submitted to them under instructions of the court, and it was the function of the jury to determine this factual question of fact.

With reference to the second contention, it is urged by defendant that the position of the wrecked automobile immediately after the accident indicates that plaintiff was not proceeding south on the west side of Cicero Street, but was "straddling" the rails between

the north and south bound car tracks and ran head-on into the center pillar of the viaduct and that he did not collide with the second pillar as testified to by Samuelson. In support of this contention it is pointed out that the automobile was moved to the east side of the highway instead of the west side immediately after the accident. Mr. Samuelson gave it as his recollection that he collided with the second pillar. Mr. Cawley, one of plaintiff's witnesses, who reached the scene of the accident shortly after it occurred, testified that he thought it was the first pillar. The first and second pillars, according to the record, are only eight feet apart. If the proximate cause of the accident was the defective condition of the street, which broke the steering mechanism of the automobile and caused Samuelson to lose control of the car and collide with the viaduct, it would be immaterial as to whether he struck the first or second pillar.

As to the third contention defendant urges that there is no evidence that plaintiff was in the exercise of due care and caution for her own safety. It is contended that the failure of plaintiff to tell her husband, who was driving, to turn on the bright lights so that she could see better as they approached the viaduct, amounted to contributory negligence on her part. It appears from the undisputed evidence that plaintiff's automobile had the regulation dim lights. According to the testimony of both Samuelson and his wife, it was not necessary for them to have bright lights in order to see the viaduct. They both testified that they could see the viaduct for some distance ahead. It is plaintiff's contention that the proximate cause of the accident was not the inability to see the viaduct, but rather the striking of the hole in the public street of which they had no warning, which resulted in the breaking of the steering mechanism and caused the car to collide with either the first or second pillar of the viaduct. It is clear from the evidence that State Street just before it approaches the viaduct all the way to within a few

the north and south bound car stops and can head-on into the center pillar of the viaduct and then he did not collide with the second pillar as testified to by Goodman. In support of this contention it is pointed out that the automobile was moved to the west side of the highway instead of the east side immediately after the accident. Goodman gave it as his recollection that he collided with the second pillar. Mr. Ewing, one of plaintiff's witnesses, who visited the scene of the accident shortly after it occurred, testified that he thought it was the first pillar. The first car hit second pillar, according to the record, the only eight feet apart. If the proximate cause of the accident was the defective condition of the street, which broke the steering mechanism of the automobile and caused Goodman to lose control of the car and collide with the viaduct, it would be immaterial as to whether he struck the first or second pillar.

As to the third contention defendant urges that there is no evidence that plaintiff was in the exercise of due care and caution for her own safety. It is contended that the failure of plaintiff to tell her husband, who was driving, to turn on the bright lights so that she could see better as they approached the viaduct, amounted to contributory negligence on her part. It appears from the undisputed evidence that plaintiff's automobile had the regulation dim lights. According to the testimony of both Goodman and his wife, it was not necessary for them to have bright lights in order to see the viaduct. They both testified that they could see the viaduct for some distance ahead. It is plaintiff's contention that the proximate cause of the accident was not the inability to see the viaduct, but rather the existing of the hole in the public street of which they had no warning, which resulted in the breaking of the steering mechanism and caused the car to collide with either the first or second pillar of the viaduct. It is clear from the evidence that that street just before it approaches the viaduct all the way to within a few

feet therefrom was in excellent condition and that plaintiff was keeping a lookout straight ahead as they proceeded along the highway at a moderate rate of speed. They were in a position to observe any normal condition of the street. The salient question of fact is whether or not the pavement was so defective as to suddenly and without any warning cause them to strike a hole in the pavement and deflect the course of the automobile from the road into a portion of the viaduct. It was the duty of the jury to determine this question and while this court will consider the evidence, the rule is well settled that upon a close question of fact, both as to the proximate cause of the accident and of negligence and contributory negligence, the court will not disturb a verdict unless it appears from the record that the same is manifestly against the clear weight of the evidence.

It is further urged that the city had no notice, either actual or constructive, of the alleged defective condition of the street pavement. There is no contention that the city had actual notice, and the question as to whether there was constructive notice was one of fact. If, as several of the plaintiff's witnesses testified, the hole in the pavement existed for several months prior to the accident and the jury believed this to be a fact, notwithstanding the denial thereof by several of defendant's witnesses, it would be sufficient to give the city constructive notice.

It is finally contended that the court erred in giving instruction number twelve. This instruction apprized the jury of the allegations contained in the declaration. Defendant's only criticism is that the jury might have been misled into the belief that the court was instructing them as to the facts proven, and not those charged in the declaration. We cannot agree with this criticism. Since the jury are not permitted to take the declaration and other

Fact therefore was in manifest contradiction and that plaintiff was leaving a lawful straight road to duly proceed along the highway as a reasonable man of ordinary prudence would do. The only is a question to determine any normal condition of the street. The evident question of fact is whether or not the personal use to determine as to suddenly and without any warning enough time to stopping a hole in the pavement and saliency the course of the automobile from the road into a portion of the sidewalk. It was his duty of the jury to determine this question and while this court will consider the evidence, the rule is well settled that upon a close question of fact, such as to the proximate cause of the accident or of negligence and contributory negligence, the court will not disturb a verdict unless it appears from the record that the case is manifestly against the clear weight of the evidence.

It is further urged that the city had no notice, either actual or constructive, of the alleged defective condition of the street pavement. There is no contention that the city had actual notice, and the question as to whether there was constructive notice was one of fact. If, on account of the plaintiff's witnesses testified, the hole in the pavement existed for several months prior to the accident and the jury believed this to be a fact, notwithstanding the denial thereof by several of defendant's witnesses, it would be sufficient to give the city constructive notice.

It is finally contended that the court erred in giving instruction number twelve. This instruction cautioned the jury of the allegations contained in the declaration. Defendant's only criticism is that the jury might have been misled into the belief that the court was instructing them as to the facts proven, and not those charged in the declaration. In common agree with this criticism. Since the jury are not permitted to read the declaration nor other

pleadings to the jury room for consideration, it is manifestly necessary that they be charged by the court as to what the material issues are and that was the only purpose of the instruction. It has been held that a general instruction in a negligence case, outlining to the jury the allegations contained in the declaration, is not erroneous. (Krieger v. A. L. & C. R. R. Co., 243 Ill. 544 Bernier v. Ill. Cent. R. R. Co., 236 Ill. 464; Williams v. Kaplan, 242 Ill. App. 166.)

For the reasons stated the judgment of the Superior Court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

placing in the jury room for consideration, it is manifestly apparently that they be obtained by the county in so what the material issues are that that was the only issues at the instructions. It has been held that a general instruction in a negligence case, omitting to the jury the ultimate conclusion to the decision, is not erroneous. (Kelsey v. C. R. & I. Co., 110 Ia. 224 Arnold v. Ill. Cent. R. R. Co., 98 Ia. 404; Gallagher v. Boston, 112 Ia. 240.)

Yet the evidence which the judgment of the Superior Court will be affirmed.

AFFIRMED.

Kinnick, J., not sound, d. dissent.

34436

S. HAYDEN, doing business as S. HAYDEN COMPANY,

Appellee,

v.

C. PFLUG and CHRISTINE PFLUG,

Appellants,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

261 I.A. 646

Opinion filed April 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

On January 21, 1930, plaintiff recovered a judgment by confession against defendants in the Municipal Court for $1377.80. On February 14, 1930, defendants moved to vacate said judgment and in support of their motion presented the affidavit of C. Pflug, one of the defendants. The affidavit appearing to be insufficient was withdrawn by defendants, and on February 24, 1930, they renewed their motion, supported by an amended affidavit. This being likewise withdrawn for insufficiency, they obtained leave to file an amended petition, and on March 3, 1930, presented their third affidavit, which is designated as "an affidavit of meritorious defense". Upon consideration of the latter the court denied defendants' motion to vacate the judgment, from which order this appeal is prosecuted.

The question presented for decision is whether the affidavit or petition last filed sets forth a meritorious defense to plaintiff's claim.

Briefly stated the affidavit alleges that the consideration for the note upon which judgment was entered was the purchase and sale of an automobile from one A. E. Buxton; that Buxton for the purpose of inducing affiant to purchase said automobile represented and orally warranted the same to be in good mechanical condition and running order; that Buxton well knew the automobile to contain a

Opinion filed April 16, 1931

Mr. JUSTICE ORTON delivered the opinion of the court.

On January 21, 1930, judgment was rendered in judgment by confession against defendants in the Municipal Court for $1377.60. On January 21, 1930, defendants moved to vacate said judgment and in support of their motion presented the affidavit of G. Fling, one of the defendants. The affidavit appearing to be insufficient was withdrawn by defendants, and on February 24, 1930, they renewed their motion, supported by an amended affidavit. This being likewise withdrawn for insufficiency, they obtained leave to file an amended petition, and on March 3, 1930, presented their third affidavit, which is designated as "an affidavit of meritorious defense". Upon consideration of the latter the court denied defendants' motion to vacate the judgment, from which order this appeal is prosecuted.

The question presented for decision is whether the affidavit or petition last filed sets forth a meritorious defense to plaintiff's claim.

Briefly stated the affidavit allege that the consideration for the note upon which judgment was entered was the purchase and sale of an automobile from one A. E. Morton; that Morton for the purpose of inducing affiant to purchase said automobile represented and orally warranted the same to be in good mechanical condition and running order; that Morton well knew the automobile to contain a

latent defect, and that it was not in good mechanical order when the sale was made; that it was necessary for defendant to first use and operate the automobile to determine whether or not it was in good mechanical condition and that when he attempted to use the same, he discovered the said latent defect, and shortly thereafter notified Buxton that he would not accept said automobile because of its defective mechanical condition; that plaintiff by and through his agents and representatives was present at the time the representations and warranty were made by said Buxton to the defendant and well knew that defendants relied on said representations and warranty, and that both Buxton and the agent of plaintiff, one Orr, then well knew that the said automobile was not in good mechanical order and that there was a latent defect therein which could not be determined except by use and operation; that Buxton and plaintiff by and through his agent, Orr, conspired to defraud the defendants in and about the sale of said automobile and the representations and warranty made to the defendants, well knowing them to be untrue and that defendants relied thereon.

The ground upon which the court refused to vacate the judgment and held the petition defective was defendants' failure to allege with particularity the nature of the latent defect and the absence of any facts from which the court could say that the alleged warranty of plaintiff had been breached. Before the court entered its final order an opportunity was afforded defendants to still further amend their petition so as to include specific details as to the character of the latent defect, but the defendants considered their petition sufficient and elected to stand thereby.

It is urged that in order to vacate a judgment, it is only necessary for defendants to show a prima facie defense on the merits and that if the affidavit filed in support of the motion to vacate shows that a good defense exists, the court should set aside

latter before, and that it was not in good mechanical order when the sale was made; that it was necessary for defendant to first use and operate the automobile to determine whether or not it was in good mechanical condition and that when he attempted to use the same, he discovered the said latent defect, and shortly thereafter notified Buxton that he would not accept said automobile because of its defective mechanical condition; that plaintiff by and through his agents and representatives was present at the representations and warranty were made by said Buxton to the defendant and well knew that defendants relied on said representations and warranty, and that both Buxton and the agent of plaintiff, one Orr, then well knew that the said automobile was not in good mechanical order and that there was a latent defect therein which could not be determined except by use and operation; that Buxton was plaintiff by and through his agent, Orr, conspired to defraud the defendants in and about the sale of said automobile and the representations and warranty made to the defendants, well knowing them to be false and that defendants relied thereon.

The ground upon which the court refused to vacate the judgment and hold the pleading defective was defendants' failure to allege with particularity the agents of the latent defect and the absence of any facts from which the court could say that the alleged warranty of plaintiff had been breached. Before the court entered its final order an opportunity was afforded defendants to still further amend their petition so as to include specific details as to the character of the latent defect, but the defendants considered their petition sufficient and elected to stand thereby.

It is urged that in order to secure a judgment, it is only necessary for defendants to show a prima facie defense on the merits and that if the affidavit filed in support of the motion to vacate shows that a good defense exists, the court should set aside

the judgment and permit the defense to be made. Stone v. Levinson, 228 Ill. App. 343; Mahnke v. Harmon, 308 Ill. App. 153 and Beard v. Baxter, 242 Ill. App. 480 are chiefly relied upon to support this contention. We concur in the principle enunciated in these decisions, but an examination thereof discloses that in each instance the affidavit alleged sufficient facts, which, if taken to be true, constituted a legal defense.

The rule is well established that an affidavit in support of a motion to vacate a judgment must clearly and unequivocally show a defense on the merits and that facts must be stated in the affidavit to constitute a meritorious defense and not merely facts from which it is possible to infer that such a defense exists. It was so held in Farris v. Alfred, et al, 171 Ill. App. 172, where the court in its opinion said:

> "A plea of failure of consideration should show in what manner it has failed; the circumstances of the failure should be set out with as much precision as in a declaration. Honeyman v. Jarvis, 64 Ill. 366. 'The plea must state particularly in what the failure consisted.' 'General averments are not sufficient.' Parks v. Holmes, 32 Ill. 532; Baldwin v. Banks, 30 Ill. 48. Under the plea there was no specific fact averred upon which an issue of fact could be made to submit to a jury."

The affidavit in the instant case purports in effect to set up a plea of failure of consideration. The court in Honeyman v. Jarvis, supra, where a like plea was interposed in a suit upon a promissory note, pointed out the reason for the rule that where failure of consideration is interposed as a defense facts must be stated upon which the plea is based. The court said:

> "The latter (plea of failure of consideration) is framed upon the theory that there was originally a good or valuable consideration, but which has failed by facts subsequent. These facts comprise affirmative matters which must be particularly stated in order to apprise the plaintiff of what he is required to meet by evidence."

We regard the rule laid down in the foregoing and other cases as in accord with the weight of authority, and the fact that strict pleadings are not required in the Municipal Court in cases

the judgment not permit the defence to be made. Shaw v. Robinson, 1Q1 Ill. App. 369; Potter v. Brown, 80 Ill. App. 164 and Grant v. Barker, 80 Ill. App. 180 are directly relied upon to support this contention. We concur in the principle enunciated in these decisions, but an examination thereof discloses that in each instance the affidavit alleged multiplicity of claims, which, if true, constituted a legal defense.

The rule is well established that the affidavit in support of a motion to strike a judgment must clearly and unequivocally show a defense on the merits and that facts must be stated in the affidavit to constitute a meritorious defense and merely facts from which it is possible to infer that such a defense exists. It was so held in Martin v. Alford, 47 Ill. App. 478, where the court in its opinion said:

> "A plea of failure of consideration should show in what manner it has failed, the circumstances of the failure should be set out with such certainty as to be intelligible. Lawrence v. Martin, 26 Ill. 386. The plea must state particularly in what the failure consisted. General averments are not sufficient." Trego v. Tatem, 26 Ill. 271; Phillips v. Moore, 30 Ill. 64. Merely the fact that there was an specific breach several times which is shown of fact would be made to submit to a jury."

The affidavit in the instant case purports to set up a plea of failure of consideration in effect. The court in Hoffman v. Jarvis, supra, where a like plea was interposed in a suit upon a promissory note, pointed out the reason for the rule that where failure of consideration is interposed as a defense facts must be stated upon which the plea is based. The court said:

> "The matter (plea of failure of consideration) is treated also the theory that there was multiplicity a good or valuable consideration, but which has failed by facts subsequent. These facts constitute affirmative matters which must be particularly stated in order to support the plea(sic) of what he is required to meet by evidence."

We regard the rule laid down in the foregoing and other cases as in accord with the weight of authority, and the fact that affidavit pleadings are not required in the municipal court in cases

of the fourth class, as defendants contend, does not justify dispensing with this essential requirement of any pleading by which it is sought to vacate a judgment theretofore entered. Defendants' third petition upon which the court's final order was entered, purported to be an affidavit of meritorious defense. The naked charge that the automobile purchased had a latent defect and that the oral warranty therefore failed are mere conclusions of the pleader and fail to comply with the requirements of the authorities.

It is further urged that there are sufficient other reasons set forth in the petition and affidavit to set aside the judgment. The only other allegation is one of conspiracy between Buxton and plaintiff's representative, Orr, "to defraud this defendant in and about the sale of said automobile and in and about the said representations and warranty to this defendant that said automobile was in good mechanical order and running condition" etc. We believe that this contention may effectually be disposed of by calling attention to the rule that where fraud is charged, facts must be pleaded to support the allegation, and that mere conclusions of the pleader are not sufficient to support allegations of fraud. Doose v. Doose, 300 Ill. 134; The State v. I. C. R. R. Co., 246 Ill. 188.

It is urged on behalf of plaintiff that defendant's affidavit was defective in that it contained no allegations as to a tender of compensation for the intermediate use of the automobile, and made no averments that the automobile when returned was in as good a condition as when it was received. In view of our conclusion upon the insufficiency of the affidavit upon the grounds already discussed, we deem it unnecessary to further consider these contentions.

For the reasons stated, the order of the trial court denying the motion to vacate the judgment will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

of the fourth class, an intermediate contract, that was justify plaintiff's making of this specific statement of law pertaining to which it is enough to render a judgment thereunder entered. Defendants' THIRD petition alege that the court's final order was entered, perhaps to be an affidavit of notification motion. The mere showing that the automobile involved had a latent defect and that the oral warranty therefore failed was more conclusion of the pleader and fail to comply with the requirements of the authorities.

It is further urged that there are sufficient other reasons set forth in the petition and affidavit to set aside the judgment. The only other allegation is one of conspiracy between Burton and plaintiff's representatives, etc. "to defraud the defendant in and about the sale of said automobile and in and about the said representations and warranty to this defendant that said automobile was in good mechanical order and running condition" etc. It follows that this conclusion may effectively be disposed of by calling attention to the rule that where fraud is charged, facts must be pleaded to support the allegations, and that mere conclusions of the pleader are not sufficient to support allegations of fraud. Jones v. Jones, 300 Ill. 174; The State v. I. C. R. R. Co., 246 Ill. 126.

It is urged on behalf of plaintiff that defendant's affirmative defense in that it constituted an attempt on its part to make a matter of compromise for the intermediate use of the automobile, and made no warranty that the automobile when returned was in as good a condition as when it was received. In view of our conclusion upon the insufficiency of the affidavit upon the ground already discussed, we deem it unnecessary to further consider these contentions.

For the reasons stated, the order of the trial court denying the motion to vacate the judgment will be affirmed.

AFFIRMED.

STARNES, P.J. and HEBEL, J., concur.

34463

D. L. TARJAN,
Appellee,
v.
PETER SERELAS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

261 I.A. 647

Opinion filed April 15, 1931

MR. JUSTICE FRIANO delivered the opinion of the court.

Suit was brought by attachment in the Municipal Court of Chicago. The affidavit of plaintiff alleged as grounds for attachment (1) that defendant conceals himself and stands in defiance of an officer so that process cannot be served upon him; and (2) that defendant is about to depart from the state with the intention of having his effects removed from the state. The return of the attachment writ showed no property found, but service of process was had upon the Studebaker Securities Co., a corporation, as garnishee. Interrogatories submitted to the garnishee disclosed that it had the sum of $1300 belonging to defendant.

Plaintiff's statement of claim alleges an oral agreement entered into with defendant in July 1929, whereby the parties were to share equally commissions earned by them through the sale of certain stocks, bonds and other securities; that said parties sold 4000 shares of stock of Utility Power and Light Company and became entitled to a commission of $3,000, of which plaintiff claimed one-half or $1500.

Upon the hearing of the cause the court rendered judgment for plaintiff upon his claim for commissions in the sum of $1250, but found the issues on the attachment against the plaintiff, quashed the attachment writ and discharged the garnishee. This appeal is prosecuted by defendant to reverse the judgment as to $1250, and cross errors are assigned by plaintiff to reverse the judgment of the court on the attachment writ.

Defendant urges two grounds for reversal of the judgment for commissions; (1) that there can be no recovery because plaintiff was not registered with the Secretary of State, being a dealer, broker, solicitor or agent, offering for sale and selling securities within this state; and (2) that the evidence does not support the judgment.

The briefs contain no statement as to the facts. It appears, however, from the plaintiff's testimony, as shown by the abstract of record, that he made an oral agreement with defendant in the office of the Studebaker Securities Co., in the presence of John J. Seerley, Treasurer of the latter concern, to help defendant who was employed as salesman for the Studebaker Co., sell Utility Power and Light stock and to receive from defendant one-half of the commissions paid thereon; that plaintiff furnished to defendant the names of customers who purchased 4900 shares of this stock, and the Studebaker Securities Company, through defendant, their salesman, delivered the stock to the purchasers secured by plaintiff.

John J. Seerley testified that plaintiff and defendant met in his office; that he did not know whether plaintiff sold any of the securities, but that such an arrangement as plaintiff testified to was not unusual; that defendant sold considerable Utility Power and Light Company stock through the Studebaker Company, and before the commission was finally due and paid to defendant plaintiff came in and "told me what he stated to be his arrangement with Mr. Serelas."

L. C. McCue testified that defendant brought plaintiff to him and introduced him as a man assisting him, Serelas, on Utility Power and Light Company stock; that they could not get any more stock from the Studebaker Company and requested the witness to let them have some of his stock; that McCue agreed to pay $1.00 per share commission which plaintiff and defendant agreed in the witness' presence to divide between them; that a total commission of $1800 was thus earned by the parties, $900 of which was paid to plaintiff and the other

defendant urges two grounds for reversal of the judgment for association: (1) that there was no testimony because plaintiff was not registered with the Secretary of State, being a dealer, broker, salesman or agent, affirmed for sale and selling securities within this state; and (2) that the evidence does not support the judgment.

The briefs contain no statement as to the facts. It appears, however, from the plaintiff's testimony, as seen by the abstract of record, that he made an oral agreement with defendant in the office of the Studebaker Securities Co., in the presence of John L. Seeley, treasurer of the latter concern, to help defendant who was employed as salesman for the Studebaker Co., sell Utility Power and Light stock and to receive from defendant one-half of the commissions paid thereon; that plaintiff furnished to defendant the names of customers who purchased 4000 shares of this stock, and the Studebaker Securities Company, through defendant, their salesman, delivered the stock to the purchasers secured by plaintiff.

John L. Seeley testified that plaintiff and defendant met in his office; that he did not know whether plaintiff sold any of the securities, but that such an arrangement as plaintiff testified to was not unusual; that defendant sold considerable Utility Power and Light Company stock through the Studebaker Company, and before the commission was finally due and paid to defendant plaintiff came in and "told me that he stated to be his arrangement with Mr. Sutton."

L. C. Sutton testified that defendant brought plaintiff to him and introduced him as a man assisting him. Besides, on Utility Power and Light Company stock, that they would not get any more stock like the Studebaker Company and presented the issues to let them have some of his stock; that some stated to pay $1.00 per share commission which plaintiff was interested in the clients' business to divide between them; that a total commission of $1800 was thus earned by the parties, $900 of which was paid to plaintiff and the other

$900 tendered to defendant, who refused to accept it.

As against this testimony there appears only the denial of defendant that he had any agreement with plaintiff in respect to commissions.

While it is the duty of this court to consider the evidence adduced upon the trial, the rule is well settled that the findings of the court will not be disturbed on questions of fact, unless it appears from the record that they are manifestly against the weight of the evidence. Whether or not such an agreement existed was a question of fact presented to the court, who heard the witnesses and made his findings, and we cannot say that the court erred in holding that the oral agreement such as plaintiff contends for was made between the parties at the time stated.

Upon the question as to whether plaintiff is precluded from recovering because he was not registered with the Secretary of State, we regard the case of Jarusz v. Hamon, et al, 245 Ill. App. 600, and decisions cited therein as controlling. In that case a real estate salesman sued the broker by whom he was employed for one-half of the commission received by the broker upon an exchange of real estate brought about through the efforts of the salesman. A like defense was there interposed, but the court in its opinion said:

> "We think that the law requiring a real estate salesman to obtain a certificate from the State authorities is not applicable here. Plaintiff here is not seeking to recover a commission, but to recover compensation from his employer which was paid by the owners of the property to the defendant. If plaintiff were bringing an action against the owners of the property to recover commissions, then the statute would apply; but that is not the situation we have before us."

This case and Gibons v. Williams, et al, 191 Ill. App. 594; Gross v. Strauss, 208 Ill. App. 263, and Simon v. Hollei, 243 Ill. App. 629, thus recognize the distinction between cases where a party, acting as broker or salesman generally, attempts to enforce claims for

1900 because it indicates, who ought to assign it.

In spite of the testimony this supports only the denial of defendant that he had any agreement with plaintiff in respect to commissions.

While it is the duty of this court to consider the evidence adduced upon the trial, the rule is well settled that the findings of the court will not be disturbed on questions of fact, unless it appears from the record that they are manifestly against the weight of the evidence. Whether or not such an agreement existed was a question of fact presented to the court, who heard the witnesses and made his findings, and we cannot say that the court erred in holding that the oral agreement upon as plaintiff contends for was made between the parties as the time stated.

Upon the question as to whether plaintiff is precluded from recovering because he was not registered with the secretary of State, we regard the case of Dunnen v. Dunnen, et al. 268 Ill. App. 500, and decisions cited therein as controlling. In that case a real estate salesman sued the broker by whom he was employed for one-half of the commission received by the broker upon an exchange of real estate brought about through the efforts of the salesman. A like defense was there interposed, but the court in its opinion said:

> "We hold that the plaintiff's real estate salesman is entitled to recover from the State authorities in the proceeding here. Plaintiff here is not seeking to recover a commission, but to recover compensation from his employer which was paid by the owner of the property to the defendant. If plaintiff were bringing an action against the owners of the property to recover commissions, then the statute would apply; but that is not the situation as we see matters."

This case and Gibbons v. Williams, et al. 192 Ill. App. 396; Stone v. Kramer, 308 Ill. App. 328, and Simon v. Moller, 240 Ill. App. 600, also recognize the distinction between mere sharp a party, acting as broker or salesman generally, attempts to enforce claims for

commissions against customers or clients without having qualified in the manner provided by statute, and situations wherein a party seeks to recover from another part of the commission earned by their joint efforts.

Upon the attachment issues there is likewise a close question of fact which was heard and determined by the court and we are not disposed to disturb this finding.

For the reasons stated the judgment of the trial court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL , J. CONCUR.

[illegible] opinion [illegible] of [illegible] [illegible] [illegible]

34517

ROBERT R. ANDERSON COMPANY, a corporation,

Appellant,

v.

OSCAR SELZER,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

261 I.A. 647

Opinion filed April 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit in the Municipal Court of Chicago upon a contract for paving the street in front of and abutting premises owned by defendant at 2603 North Moody Avenue, in Chicago, Illinois. Trial was had by jury resulting in a verdict and judgment for the defendant, from which this appeal is prosecuted.

Briefly stated the facts disclose that on January 12, 1927, plaintiff, who was then engaged in the general cement contracting business, submitted to the defendant plans and specifications for construction by private contract of a two-course concrete pavement on North Moody Avenue from the south line of Schubert Avenue to the north line of Wrightwood Avenue, all of the work to conform to the standard city specifications, and the city's acceptance of the work was to constitute the fulfilment of the contract; that the contract contained the following provision:

> "It is understood that this acceptance is not subject to cancellation except by written consent of the Robert R. Anderson Co., and that no verbal agreements will be recognized by the Robert R. Anderson Co., or written agreements unless signed by the representative whose signature appears on the aforesaid proposition."

that defendant, who among other property owners signed this agreement, was the owner of lot two, known as 2603 North Moody Avenue; that he agreed to pay plaintiff the sum of $433.35 when the work was completed and the city's acceptance issued; that shortly after the contract was signed plaintiff applied to the City of Chicago for a permit to

Mr. JUSTICE PRINDIVILLE delivered the opinion of the court.

Plaintiff brought suit in the municipal court of Chicago upon a contract for certain sewer pipe and fittings furnished by defendants at 3800 North Moody Avenue, in Chicago, Illinois. Trial was had by jury resulting in a verdict and judgment for the defendant, from which this appeal is prosecuted.

Briefly stated the facts disclose that on January 12, 1927, plaintiff, who was then engaged in the general sewer contracting business, submitted to the defendant plans and specifications for construction by private contract of a two-course concrete pavement on North Moody Avenue from the north line of Belmont Avenue to the north line of Nightingale Avenue, all of the work to conform to the standard city specifications, and the city's acceptance of the work was to constitute the fulfillment of the contract; that the contract embodied the following provisions:

> "It is understood that this contract is not subject to cancellation except by written consent of Mr. Robert E. Anderson Co., and that no verbal agreements will be recognized by the Robert E. Anderson Co., or written agreements unless signed by the representative whose signature appears on the aforesaid proposition."

That thereafter, the day after plaintiff made signed this agreement, was the owner of lot two, known as 3800 North Moody Avenue; that he agreed to pay plaintiff the sum of $433.00 when the work was completed and the city's acceptance issued; that shortly after the contract was signed plaintiff complied at the city of Chicago for a permit to

install said improvement, pursuant to which a permit was issued by the Board of Local Improvements; that afterwards plaintiff proceeded to and did install said improvement, and on the 24th day of September, 1927, the Board of Local Improvements issued to plaintiff its certificate that the work had been completed, inspected and found to agree with the specifications governing the same; that on March 7, 1927, plaintiff wrote the defendant calling his attention to the contract he had signed, thanking him for the same and advising him that the work would be commenced, the pavement installed shortly thereafter, and that his assessment was fixed at $435.95; that during the process of installation of said pavement defendant resided on the premises mentioned, saw the work going on and made no protest; that on the 19th day of March, 1928, plaintiff advised defendant by letter that he had not paid the bill for his share of the improvement, and insisted upon payment of the account forthwith; that no answer was made to said communication, whereupon plaintiff again on the 28th day of March, 1928, called plaintiff's attention to the past due account.

Over the objection of plaintiff the court permitted evidence of a meeting of property owners on March 20, 1927, at which Mr. Kaercher and Mr. Kotzen of the plaintiff company were present and the statement was made by one of the property owners present that the cost of $15 per foot for the pavement was "pretty high"; that Mr. Kaercher thereupon stated that "if anybody was not satisfied he would take back their contract"; that defendant thereupon tendered back his copy of the contract which was accepted by Kaercher and that several other property owners likewise tendered back their agreements.

Defendant's signature to the original contract is not disputed. There is a conflict, however, as to whether Kaercher made the statement attributed to him with reference to receiving back contracts of any property owner who was not satisfied, and whether defendant did in fact return his copy of the contract.

Install and Improvement, pursuant to which a permit was issued by the Board of Local Improvements; that defendant plaintiff proceeded to and did install said improvements, and on the 11th day of September, 1927, the Board of Local Improvements issued to plaintiff its certificate that the work had been completed, inspected and found to agree with the specifications governing the same; that on March 7, 1927, plaintiff wrote the defendant calling his attention to the contract he had signed, thanking him for the same and stating his that the work would be commenced, the payment installed shortly therefor, and that his assessment was fixed at $288.50; that during the process of installation of said pavement defendant visited on the premises occasional, saw the work going on and made no protest; that on the 15th day of March, 1928, plaintiff advised defendant by letter that he had not paid the bill for his share of the improvement, and inclosed upon payment of the account furthermore; that no answer was made to said communication, whereupon plaintiff again on the 28th day of March, 1928, called plaintiff's attention to the past due account.

Over the objection of plaintiff the court permitted evidence of a meeting of property owners on March 30, 1927, at which Mr. Kanofer and Mr. Ratman of the plaintiff company were present and the statement was made by one of the property owners present that the cost of 11½ per foot for the pavement was "pretty high"; that Mr. Kanofer thereupon stated that "if anybody was not satisfied he would take back their contract"; that defendant thereupon tendered back his copy of the contract which was accepted by Kanofer and that several other property owners likewise tendered back their agreements.

Defendant's signature to the original contract is not disputed. There is a conflict, however, as to whether Kanofer made the statement attributed to him with reference to tendering back contracts of any property owner who was not satisfied, and whether defendant did in fact return his copy of the contract.

Upon this issue of fact defendant testified that he was present at the meeting on March 30th together with about 75 or 100 other property owners; that both Kaercher and Kotzen were there; that some discussion ensued about the expense of the improvement and an opinion given by some of the property owners that the cost was rather high; that Kaercher then stated that if any property owners were not satisfied he would take back their contracts, and defendant tendered his copy to Kaercher, who accepted the same, and that of several others; that Kotzen came to the home of defendant about six weeks thereafter and requested him to sign another agreement, stating that if he refused to do so plaintiff would hold defendant to his first contract.

Carl Steffa, a witness called on behalf of defendant, stated that he lived across the street from defendant; that he also signed one of the contracts; that he attended the meeting on March 30th, when Kaercher spoke and heard him make the statement testified to by defendant; that he was present at defendant's home about six weeks thereafter when Kotzen called and heard the latter say that if defendant did not sign another contract he would hold him to the first agreement; that defendant, however, refused to sign, whereupon Kotzen stated that everybody in the neighborhood had signed contracts except defendant.

Kaercher on behalf of plaintiff stated that he attended the meeting in question; that "there was a lot of political talk and I informed them that the street would be paved"; that neither at that time nor at any other time did he take back any contracts from people who had theretofore signed, and that nobody requested him to do so; that he never knew defendant, nor met him until their attendance upon the trial of the cause in court, and that he never stated at the property owners' meeting that he would accept back contracts of dissatisfied owners.

Upon this issue of fact defendant testified that he was present at the meeting on March 20th together with about 75 or 100 other property owners; that both Lawrence and Jackson were there; that Mr. Kimball spoke; that he was not at the conference at the Commissioner's office; that he did not hear any contracts signed; and that the opinion given by some of the property owners that the cost was rather high; that Lawrence then stated that if the property owners were not satisfied he would take back their contracts, and defendant thought his very in Lawrence, who followed the man, and that at several occasions; that Lawrence came to the home of defendant about six weeks thereafter and requested him to sign another agreement, stating that if he refused to do so plaintiff would hold defendant to his first contract.

Cross-examination, a witness called on behalf of defendant, stated that he lived across the street from defendant; that he also signed one of the contracts; that he attended the meeting on March 20th, when Lawrence spoke and said the same statement testified to by defendant; that he was present at defendant's home about six weeks thereafter when Lawrence called and asked the latter why that if defendant did not sign another contract he would hold him to the first agreement; that defendant, however, refused to sign, whereupon Lawrence stated that everybody in the neighborhood had signed contracts except defendant.

Recross-examination of plaintiff stated that he attended the meeting in question; that "there was a lot of political talk and I informed them that the street would be paved"; that neither at that time nor at any other time did he take back any contracts from people who had theretofore signed, and that nobody requested him to do so; that he never knew defendant, nor was his name called defendant upon the trial of the cause in court, and that he never stated to the property owners' meeting that he would accept less contracts of assessment.

Kotzen, testifying on behalf of plaintiff, denied that he had called on defendant except the first time when he procured his signature to the original contract.

The grounds chiefly relied upon for reversal are, first, that the contract in question could not be terminated by parol agreement of the parties; second, that the evidence tending to show a surrender was improperly received; and third, that the verdict is manifestly against the weight of the evidence.

As to the first contention, the rule followed in this state is well expressed in Alschuler v. Schiff, 164 Ill. 308. In that case plaintiff sued on a written lease. It appears from the facts that when the landlord demanded rent, which had become due under the lease, the tenant advised him, "I will pay the rent but I want you to fix up the place. I am damaged here every day, and I cannot stay here until it is fixed"; that the landlord thereupon stated, "I won't fix anything for you. If you don't want to stay here you can move out", to which the tenant replied "all right; I will take another place and move out", and the landlord said, "all right". The principal question presented for decision was whether the surrender of a written lease under seal could be shown by parol testimony. As to this the court said that a sealed executory contract cannot be altered, changed or modified by parol, and pointed out that this rule of the common law had been adopted by the courts of this state and followed consistently in a long line of unbroken authorities. The court then proceeded to state that:

> "A distinction, however, must be drawn between contracts of this character, which are relied on as being in force with some provision alleged to have been changed by an oral agreement, and those which it is insisted, in defense, have been absolutely abrogated and surrendered by parol agreement of the parties thereto. A defendant might, by parol proof, show, in an action against him on a contract or lease under seal, that he had made full payment of all amounts due, and thus was discharged. He might also, by parol testimony, show an eviction where there was no default by him in his

Ketum, insisting on behalf of plaintiff, denied that he had relied on defendant beyond the first time she presented his signature to the original contract.

The jurors unanimously relied upon for answers, inter alia, that the contract in question could not be terminated by parol agreement of the parties; second, that the evidence tending to show a mutually was improperly received and that, but the verdict is manifestly against the weight of the evidence.

As to the first contention, the rule followed in this state is well expressed in Lawrence v. Dorsch, 184 Ill. 294. In that case plaintiff sued on a written lease. It appears from the facts that when the landlord demanded rent, which had become due under the lease, the tenant advised him, "I will pay the rent but I want you to fix up the place. I am damaged here every day, and I cannot stay here until it is fixed"; that the landlord thereupon stated, "I won't fix anything for you. If you don't want to stay here you can move out", to which the tenant replied "all right; I will take another place and move out", and the landlord said, "all right". The trial court granted for defendant was whether the surrender of a written lease under seal could be shown by parol testimony. In its opinion the court said that a sealed instrument cannot be altered, changed or modified by parol, and pointed out that this rule of the common law had been adopted by the courts of this state and followed consistently in a long line of unbroken authorities. The court then proceeded to state that:

"a distinction, however, must be drawn between cases where the terms of this character, which are relied on as being in force, were original elements of the contract and those which are added as an part of the original agreement, and those which it is insisted, in defense, have been subsequently engrafted and substituted by parol agreement of the parties thereto. A different right, by parol proof, when, in an action against him on a contract or lease under seal, they be not made full payment of all amounts due, and that was disclosed. The right also, by parol testimony, show an existing where there was an default by him in his

> lease, and thus a discharge. We known of no good reason why he may not also show, by parol proof, that by agreement between the landlord and himself he has been released from the terms and obligations of the lease, and has, in pursuance thereof, surrendered possession of the premises to the landlord."

The court also held that the question whether there was a surrender of the lease was one of fact and that evidence upon this question was competent and should have been submitted to the jury, citing Baker v. Pratt, 15 Ill. 568; White v. Walker, 31 Ill. 423; Allen v. Jaquish, 21 Wend. 628.

The distinction thus made between executory contracts and those which have been absolutely abrogated and surrendered is applicable to the case before us, and we accordingly hold, as to plaintiff's first two contentions, that parol evidence was competent to show a surrender of the contract and that the written instrument was terminated by parol agreement of the parties.

The remaining question relates to the surrender of the contract by defendant at the meeting of property owners on March 20th. As to this there is a sharp conflict of evidence. Defendant and two other witnesses testified that Kaercher offered to receive back the contract of any dissatisfied property owner, and that defendant tendered his copy to Kaercher, who accepted the same. On behalf of plaintiff, Kaercher and Kotzen denied that any such statement was made and that defendant surrendered his agreement. The jury heard all the witnesses, had an opportunity to judge their credibility and resolved the issues of fact against plaintiff. From an examination of the record we cannot say that the verdict is against the manifest weight of the evidence and accordingly we are not disposed to disturb the verdict.

For the reasons stated the judgment of the Municipal Court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

> issue, and thus a disclaimer, in lieu of its good reason why he may not also do, by jural proof, that by agreement between the landlord and tenant, the lease released from the terms and obligations of the lease, and has, in consequence thereof, surrendered possession of the premises to the landlord.'

The court also held that the question whether there was a surrender of the lease was one of fact and that evidence upon this question was competent and should have been submitted to the jury, citing Baker v. Pratt, 12 Ill. App; White v. Dreher, 73 Ill. 351; Lewis v. Jacobs, 21 Ind. 274.

The distinction thus made between express contracts and those which have been absolutely abrogated and surrendered is applicable to the case before us, and we accordingly hold, as to plaintiff's first two combinations, that prima evidence was competent to show a surrender of the contract and that the written instrument was terminated by mutual agreement of the parties.

The remaining question relates to the surrender of the contract by defendant at the meeting of property owners on March 27th. As to this there is a sharp conflict of evidence. Defendant and two other witnesses testified that Barcher offered to release him from the contract of any dissatisfied property owner, and that defendant tendered his copy to Barcher, who accepted the same. On behalf of plaintiff, Barcher and Rotsen denied that any such statement was made and that defendant surrendered his agreement. The jury heard all the witnesses, had an opportunity to judge their credibility and resolved the issues of fact against plaintiff. From an examination of the record we cannot say that the verdict is against the manifest weight of the evidence and accordingly we see no ground to disturb the verdict.

For the reasons stated the judgment of the Municipal Court will be affirmed.

AFFIRMED.

ELLIOTT, P.J. and SCHAE, J., concur.

34538

S. R. BURGOYNE,

(Complainant) Appellee,

v.

J. L. PYLE, HENRY BAASE, ANGELINE CREPPS, ARETA CREPPS, CHARLES RINGER, individually and as trustee, and the unknown owner or owners, holder or holders of certain notes secured by and described in a deed of trust from Henry Baase, Angeline Crepps and Areta Crepps to Charles Ringer, as trustee, dated May 9, 1927, and recorded in the Office of Registrar of Titles of Cook County, Illinois, on June 9, 1927, as Document No. 357869.

Defendants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

On Appeal of HENRY BAASE, ANGELINE CREPPS and ARETA CREPPS,

(Defendants) Appellants.

261 I.A. 647

Opinion filed April 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

This case comes up on appeal, together with case number 34639. The essential facts and the various contentions made are discussed in the latter opinion. Only one additional ground for reversal is urged in this proceeding.

In addition to the various contentions made in case number 34639, it is here urged that the master and chancellor erred in accepting in evidence in this case, over the objection of defendants, a carbon copy of a transcript of testimony given in the other case, where these defendants were not parties and involving property not here involved.

With reference to this contention it appears that the two proceedings were referred to the master and heard contemporaneously. The only testimony offered on behalf of the complainant, Burgoyne, was taken March 22, 1928. This was supplemented by documentary proof on April 11, 1928. At the first two hearings

Opinion filed April 16, 1922

Mr. JUSTICE FULTON delivered the opinion of the court.

This case comes up on appeal, together with case number 14231. The municipal court and the municipal contractors were dismissed in the lower courts. Only one additional ground for reversal is urged in this proceeding.

In addition to the various contractors made in each number 14231, it is here urged that the master and chancellor erred in rejecting in evidence in this case, over the objection of defendants, a certain copy of a memorandum of testimony given in the other case, where these defendants were not parties and investigated property not party involved.

With reference to this contention it appears that the two proceedings were referred to the master and heard consequentially. The only testimony offered on behalf of the complainant, Metzger, was taken March 23, 1922. This was supplemented by documentary proof on April 11, 1922. As the first two pleadings

counsel for defendants laid the foundation for an objection to the duplication of records "should he subsequently desire to avail himself of it." In other words, evidence which was applicable to one case, was alike applicable to the other case, and counsel for complainant and intervening petitioners, for the sake of expediency, proceeded to introduce the testimony of witnesses in case number 34639 in contemplation of introducing a carbon copy of that evidence and incorporating it into the record in this proceeding upon the ground that the testimony would be identical in both cases and would therefore avoid the necessity of having witnesses testify twice to the same matters. This plan was followed through a considerable portion of the hearings before the master, and in some instances there was cross examination by the defendants of witnesses in reference to both proceedings. While defendants' consent to this procedure does not appear in the record in express language, the record discloses no actual objection thereto and shows that on November 2, 1928 counsel for defendants asked the master for an order upon the complainant to turn over the original typewritten transcript of the testimony taken on behalf of the complainant which was written up in typewritten form. The record also discloses a like motion made before the master followed by a motion for a continuance "until counsel should be afforded an opportunity to examine the testimony taken on behalf of the complainant". Moreover on December 11, 1928, defendants' counsel unqualifiedly moved the master to strike from this record the testimony of Burgoyne, the complainant, solely on the ground of alleged variance between it and the averments of the bill as amended. The first actual objection to receiving the direct evidence of witnesses in the second case (34538) appears on page 81 of the abstract. Prior thereto 279 pages of testimony had been taken. Following this objection the testimony of two other witnesses appears

counsel for defendants laid the foundation for an objection to the duplication of records "should be subsequently desire to avail himself of it." In other words, evidence which was applicable to one case, was also applicable to the other case, and counsel for complainant and intervening petitioners, for the sake of expediency, permitted an intermixed the testimony of witnesses in one matter [illegible] of introducing a written copy of that evidence and incorporating it into the record in this proceeding upon the ground that the testimony would be identical in both cases and would therefore avoid the necessity of having witnesses testify twice to the same matters. This plan was followed through a considerable portion of the hearings before the master, and in some instances there was cross examination by the defendants of witnesses in reference to both proceedings. While defendants' consent to this procedure does not appear in the record in express language, the record discloses no actual objection thereto and shows that on November 2, 1938 counsel for defendants asked the master for an order upon the complainant to turn over the original typewritten transcript of the testimony taken on behalf of the complainant which was written in stenotype form. The record also discloses a like motion made before the master followed by a motion for a continuance "until counsel should be afforded an opportunity to examine the testimony taken on behalf of the complainant." Moreover on December 11, 1938, defendants' counsel unequivocally moved the master to strike from this record the testimony of Kurzyna, the complainant, solely on the ground of alleged variance between it and the statements of the bill as amended. The first actual objection to receiving the direct evidence of witnesses in the second case (34838) appears on page 81 of the abstract. Prior thereto 279 pages of testimony had been taken. Following this objection the testimony of two other witnesses appears

and no objection was made to the duplication of their testimony to cover this case. There appears on page 107 of the abstract the following statement by defendants' counsel, "We have always followed the practice of starting in one case, and then if I can consent to it, I will consent that this be written up with the other case." It was shortly thereafter that counsel definitely refused to follow the practice which had theretofore been adopted between the parties, and we are now asked to reverse this cause on the ground that the master permitted various testimony taken in the first proceeding to be introduced and attached to the transcript of record in the instant case.

We are not disposed to reverse the decree upon this ground for several reasons: (1) we are satisfied from an examination of the record that counsel for defendants made no real objection to the procedure followed by the parties and concurred in by the master, until after several hundred pages of testimony had been taken. If counsel desired to insist upon his point that the two cases be tried separately, it was their privilege to do so, but it was also incumbent upon them to insist on their rights from the beginning and not to lull the other parties into believing that they would make no objection thereto and allow the lien claimants to proceed in a manner apparently satisfactory to them through a major portion of the case. (2) The only objections filed to the master's report which raised this question are objections numbers 1 and 23, both of which are general in their nature. They do not point out what evidence of particular witnesses is complained of, and require the court to sift out all the evidence adduced on behalf of defendants received in one case over the objection of counsel. Many of these objections embrace testimony of all witnesses. It has been generally held that objections to a master's report must be specific and must point out with reasonable certainty the precise matters complained of. (Springer v. Kroeshell, 161 Ill. 358;

and no objection was made to the decision of court tendency to cover this case. There appears on page 107 of the abstract the following statement by defendant's counsel, "We have always followed the practice of starting in one case, and then if I can convince it, I will concede that this be written up with the other case." It was shortly thereafter that counsel definitely refused to follow the practice which the [illegible] had adopted before the jury, and we are now called to review this course on the ground that the proper permitted various testimony taken in the first proceeding to be introduced and attached to the transcript of record in the instant case.

We are not disposed to reverse the decree upon this ground for several reasons: (1) we are satisfied from an examination of the record that counsel for defendants made no real objection to the procedure followed by the parties and concurred in by the court, until after several hundred pages of testimony had been taken. If counsel desired to insist upon his point that the two cases be tried separately, it was their privilege to do so, but it was also incumbent upon them to insist on their rights from the beginning and not to lull the other parties into believing that they would make no objection thereto and allow the lien claimants to proceed in a manner apparently satisfactory to them through a major portion of the case. (2) The only objections filed to the master's report which raised this question are objections numbers 1 and 22, both of which are general in their nature. They do not point out what evidence of particular witnesses is complained of, and require the court to sift out all the evidence adduced on behalf of defendants received in one case over the objection of counsel. Many of these objections embrace testimony of all witnesses. It has been generally held that objections to a master's report must be specific and must point out with reasonable certainty the points relied upon. Chicago v. Lonergan, 124 Ill. 383;

Hays v. Hammond, 162 Ill. 133). (3) We are satisfied from an examination of this record that substantially all of the testimony of the witnesses adduced in the manner complained of by counsel could of its very nature be nothing but a duplication of that which was given in case number 34639. The contracts of defendants having each been made orally at one time covering both jobs could be established only by the narration of the same conversation. The buildings progressed contemporaneously and were constructed from the same plans and specifications, and the lumber was delivered to both collectively. Therefore the testimony as to deliveries was necessarily the same. Burgoyne had contracts for fixed amounts. Questions of delivery were not involved as to his claim. He completed his work on both buildings and there could have been no variance in his testimony in the two proceedings. Consequently we see no force to the contention that defendants could in any wise be prejudiced in the slightest because of the method adopted upon these hearings. It was said in S. C. St. Ry. Co. v. Maday, 188 Ill. 210:

> "When the court can see from the record that an error committed by the trial court in the progress of the case was a harmless one, or that its injurious effect or harmful character was obviated, so as not to affect injuriously, in the final judgment, the rights of the party against whom the error was committed, it should not be allowed to work a reversal."

For the reasons stated in this opinion upon the additional ground urged herein, as well as for the reasons stated in the opinion in case number 34639, we believe the decree of the Superior Court should be, and the same is, accordingly affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

Ex parte v. *Dessouki*, 1Q2 Ill. 222). (2) We are satisfied from an examination of this record that substantially all of the testimony of the witnesses adduced in the manner complained of by counsel could of its very nature be nothing but a duplication of that which was given in our number 2[illegible]. The contracts of defendants having been made solely at our first meeting and plans equal to substantial only by the marketing of the same contractors. The buildings progressed contemporaneously and were constructed from the same plans and specifications, and the issues was delivered to both simultaneously. Therefore the testimony as to delivering was necessarily the same. Surgoyne had contracts for first amounts. Questions of delivery were not involved as to his claim. He completed his work on both buildings and there could have been no variance in his testimony in the two proceedings. Consequently we see no force to the contention that defendants could in any case be prejudiced in the slightest because of the method adopted upon these hearings. It was said in *E. G. Ill. Br. Co.* v. *Kohn*, 1[illegible] Ill. 6[illegible]:

> "When the court can say from the record that no error complained of by the trial court in the rendition of the case was a harmless one, or that the injurious effect of doubtful character was obviated, so as not to affect the verdict, in the final judgment, the rights of the party injured upon the error not considered, it should not be allowed to work a reversal."

For the reasons stated in this opinion upon the additional ground urged herein, as well as for the reasons stated in the opinion in our number 2[illegible], we believe the decree of the Superior Court should be, and the same is, accordingly affirmed.

AFFIRMED.

BURCH, P.J., and HEBEL, J., concur.

34593

ANDRA JANKAITIS,

Appellee,

v.

FORT DEARBORN AUTOMOBILE INSURANCE COMPANY, a Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Opinion filed April 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit in the Superior Court of Cook County to recover $1954.83 on account of a fire loss. Trial was had by jury resulting in a verdict and judgment in favor of plaintiff for $2168.22, being the amount claimed plus interest.

The declaration alleges that plaintiff was the owner of property at 2718 North Cicero Avenue, in Chicago, Illinois, and that the premises were damaged by fire on September 23, 1927; that there were three fire insurance policies on the property aggregating $27,000; that the adjusters for the insurance companies fixed the loss at $13,398.36, of which defendant's pro rata share of the loss in accordance with the amounts of the policies was $5,954.83, on which defendant paid $4,000, leaving a balance of $1954.83; that after the loss was adjusted defendant agreed and promised to pay its pro rata share.

Defendant filed a plea of the general issue and two special pleas, setting up that defendant had paid plaintiff $4,000 in full satisfaction and discharge of all claims under the policy, and had taken plaintiff's receipt and release under seal. Plaintiff's replication to the two special pleas denied that he had ever given a release or entered into an accord and satisfaction.

Opinion filed April 15, 1931

MR. JUSTICE DUNN delivered the opinion of the court.

Plaintiff brought suit in the Superior Court of Cook County to recover $1254.85 on account of a fire loss. Trial was had by jury resulting in a verdict and judgment in favor of plaintiff for $1189.50, being the amount claimed plus interest.

The declaration alleges that plaintiff was the owner of property at 1718 South Ashland Avenue, in Chicago, Illinois, and that the premises were damaged by fire on September 12, 1927; that there were three fire insurance policies on the property aggregating $27,000; that the adjusters for the insurance companies fixed the loss at $17,[illegible], of which defendant's pro rata share of the loss in accordance with the amounts of the policies was $5,954.85, on which defendant paid $4,000, leaving a balance of $1954.85; that after the loss was adjusted defendant agreed and promised to pay its pro rata share.

Defendant filed a plea of the general issue and two special pleas, setting up that defendant had paid plaintiff $4,000 in full satisfaction and discharge of all claims under the policy, and had taken plaintiff's receipt and release under seal. Plaintiff's replication to the two special pleas denied that he had ever given a release or entered into an account and satisfaction.

The essentail facts disclose that plaintiff was the owner of a garage at 2718 North Cicero Avenue, which was damaged by fire on September 23, 1927; that there was $27,000 worth of fire insurance on the property represented by three different companies; that defendant had issued a policy for $12,000, the Girard Fire & Marine Insurance Company for $5,000, and the Newark Fire Insurance Company for $10,000; that there were two mortgages on the property for $11,000 and $11,500, respectively, and the actual cash value of the property at the time of the fire was $17,500; that immediately after the fire plaintiff engaged William H. Jackson, a fire insurance adjuster, to represent him in adjusting the loss and damage, who notified each of the three insurance companies of his engagement; that the three companies thereupon each appointed an adjuster, Dreihs for the defendant, Stevenson for the Newark Fire Insurance Company and Persons for the Girard Fire and Marine Insurance Company; that Jackson thereafter went to the premises with a contractor and made a detailed estimate of the damage caused by the fire, photographed the premises and made an appointment to meet the other adjusters; that several meetings of the adjusters were held during October and November at the offices of Wagner & Glidden, going over the schedules and items of loss in an effort to come to an agreement as to the damage; that at the meeting held on October 25, 1927, an offer was made, the exact amount of which does not appear from the record, which Jackson thought would not be acceptable to the plaintiff, but stated that he would take it up with him; that another meeting was held on November 4, 1927, at which further discussion ensued and plaintiff's adjuster was then handed an Agreement for Submission to Appraisers, signed by all the companies, appointing Frank E. Doherty as their appraiser, in contemplation of submitting the fire damage to a fourth person in the event that the three appraisers could not

The documents show clearly that plaintiff was the owner of a policy on his house insured, which was damaged by fire on September 21, 1957; that there was $17,000 worth of fire insurance on the property represented by three different companies; that defendant had issued a policy for $12,000, the Hanover Fire & Marine Insurance Company for $2,000, and the Acme Fire Insurance Company for $3,000; that respectively the mortgages, on the property for $11,000 and $11,800, respectively, and the actual cash value of the property at the time of the fire was $17,500; that immediately after the fire occurred adjuster R. Jackson, a fire insurance adjuster, by prearrangement was adjusting the loss and damage, the notified each of the three insurance companies of his engagement; that the three companies thereupon each appointed an adjuster, Meigs for the defendant, Jackson for the Acme Fire Insurance Company and Thompson for the Hanover Fire and Marine Insurance Company; that Jackson thereafter met in the premises with a contractor and made a detailed estimate of the damage caused by the fire, photographed the premises and made an appointment to meet the other adjusters; that several meetings of the adjusters were held during October and November, the offices of Jackson & Meigs, where the defendant and Jackson thought would be acceptable to the plaintiff, but stated that he would take it up with him; that another meeting was held on November 4, 1957, at which further discussion ensued and plaintiff's adjuster was then handed an agreement for submission to appraisers, signed by all the companies, appointing Frank E. Doherty as their appraiser, in contemplation of submitting the fire damage to a fourth person in the event that the three appraisers could not

agree on a figure; that the parties met again on November 14, 1927, at which time, after some discussion, the sum of $1019 was added by the adjusters present to some previous amount which had been discussed at other meetings making a final figure of $13,398.36, and that the agreement for submission to Doherty, their appraiser, was never acted upon. Jackson submitted the final figures to plaintiff who accepted the same and proofs of loss were made out by Stevenson or Persons, and plaintiff settled with these two adjusters on that basis. In January defendant paid plaintiff $4,000 and took a release of claim "in full settlement of all claims for damage to property on or about the 23rd day of September, 1927, by reason of fire", signed by plaintiff, his adjuster Jackson and two others who were interested in the property as mortgagees.

There is some conflict in the evidence as to whether Dreihs was present at the meeting on November 14. Jackson testified that Dreihs attended. He did not remember which one of the adjusters acted as spokesman at the meeting nor what was said, but seemed quite positive that they were all sitting around the table when the final figure of $13,398.36 was mentioned and no objection was made thereto by any one. On direct examination Stevenson testified that he thought Dreihs was present, but on cross examination stated that he could not be positive. However, he testified to a conversation with Dreihs shortly after the meeting in which he told him "the loss had been closed off at $13,398.36." Dreihs denied having attended the final meeting and his agreement to settle on the basis of the foregoing figures.

In this connection there was received in evidence, over defendant's objection, plaintiff's sworn statement in proof of loss, to the back of which there is pasted a typewritten "statement of loss", bearing the rubber stamp signature of John Dreihs, showing the following:

agree as a fact; that the parties are again as towards it, 1927, at which time, after some discussion, the sum of $5019 was added by the adjusters present to some previous amount which had been discussed at their meeting making a final figure of $19,[illegible], and that the agreement for submission to Doherty, their appraiser, was never acted upon. Johnson submitted the final figures to plaintiff who accepted the sum and proofs of loss were made out by Stevenson or Johnson, and plaintiff testified also that the adjusters on their behalf. In January defendant paid plaintiff $4,000 and took a release of claim in full satisfaction of all claims for damage to property on or about the 22nd day of September, 1927, by reason of fire, signed by plaintiff, his adjuster Jackson and two others who were interested in the property as mortgagees.

There is some conflict in the evidence as to whether Mrsha was present at the meeting on November 21. Jackson testified that Mrsha attended. He did not remember which one of the adjusters noted an objection at the meeting not that was said, but seemed quite positive that they were all sitting around the table when the final figure of $4,000.00 was mentioned and no objection was made thereto by any one. On direct examination Stevenson testified that he thought Mrsha was present, but on cross examination stated that he could not be positive. However, he testified to a conversation with Mrsha shortly after the meeting in which he told him "the loss had been closed off at $19,500.00." Mrsha denied having attended the final meeting and his agreement to settle on the basis of the foregoing figure.

In this connection there was received in evidence, over defendant's objection, plaintiff's sworn statement in proof of loss, to the back of which there is pasted a typewritten "statement of loss", bearing the rubber stamp signature of John Mrsha, showing the following:

"STATEMENT OF LOSS.

Andrius Jankaitis and
Marcella Jankaitis, Chicago, Ill.

Fire: Sept. 23, 1927.

- -

	SOUND VALUE	LOSS
Sound value as agreed,	$17,500.00	
Loss and damage as agreed,		$13,396.36

JOHN DREIHS & COMPANY,

John Dreihs,
Adjuster."

Underneath this statement and pasted to it there appears plaintiff's verified notice of assignment to Whitaker & Jackson of fees due them as adjusters from the proceeds of plaintiff's settlement. The original proof and statement of loss, together with this notice, were filed here by stipulation of the parties. It is urged with respect to these documents that they corroborate plaintiff's contention that Dreihs on behalf of defendant agreed to the final settlement figures and were therefore properly admitted in evidence. Defendant urges, however, that the court erred in admitting them, and argues that proofs of loss, while competent to show compliance with the terms of the policy, may not be considered in ascertaining the amount of damages. While it is true that plaintiff sued on the agreement to pay rather than on the policy, we believe the documents were properly admitted to sustain the allegation of the declaration that proof of loss was furnished by plaintiff and not waived. Furthermore the typewritten statement of loss was competent to prove the agreement upon which plaintiff's suit is founded, and to corroborate plaintiff's contention that Dreihs agreed to the settlement on behalf of defendant.

The evidence is conflicting as to when the statement of loss signed by Dreihs was attached to the proof of loss. Jackson testified that he sent a copy of the proof of loss to each company.

"attorney in fact".

Insurance Companies :ed
Marketing Contracts. Citizens, Ill.

First Dist. Ct. App.

* *

MOTION FOR LEAVE TO

Proof value on appeal. 217,Ann.Ca
Loss and damage in mining. 217,Ill.34

JOINT MOTION & STATEMENT.

Joint motion.
Defendant.

Endorsed this statement and posted to it there appears plaintiff's verified notice of assignment to minister a Jackson of less the than an signature from the proceeds of plaintiff's settlement. The original proof and statement of loss, together with this motion, were filed here by stipulation of the parties. It is urged with respect to these documents that they contradicts plaintiff's contention that suits on behalf of defendant agreed to the final settlement figures and were therefore improperly admitted in evidence. Defendant urges, however, that the court erred in admitting them, and argues that proofs of loss, while competent to show compliance with the terms of the policy, may not be considered in ascertaining the amount of damages. While it is true that plaintiff sued on the agreement to pay rather than on the policy, we believe the documents were properly admitted to sustain the allegation of the declaration that proof of loss was furnished by plaintiff and was waived. Furthermore the stipulations admitted of loss was accepted by proofs the agreement upon which plaintiff's suit is founded, and to corroborate plaintiff's assertion that suits agreed to the settlement on behalf of defendant.

The evidence is conflicting as to when the statement of loss signed by Davies was attached to the proof of loss. Jackson testified that he sent a copy of the proof of loss to each company.

The evidence also shows that Dreihs, on behalf of defendant, received a "statement of loss", which, according to his testimony, he "ignored" and left lying on his desk until early in January, when, as he contends he pasted it to the proof of loss. Plaintiff urges, however, that the statement of loss was pasted to the other document shortly after the final meeting of adjusters on November 14, and not in January, as Dreihs testified. Whatever the fact may be, it appears that defendant made no objection to the statement of loss until after the two other companies had settled their proportionate shares.

It thus appears that there is a conflict in the evidence as to these various circumstances bearing upon the important question of fact as to whether Dreihs agreed to the final settlement figures. The jury heard the witnesses, had an opportunity to determine their credibility and resolved the issues in favor of plaintiff. It appears to us from an examination of the record that whether or not Dreihs participated in the meeting of November 14, he was certainly apprised of the settlement shortly thereafter, and neither he nor the defendant whom he represented made any objection thereto until long after the other companies had paid their proportionate shares. In view of Dreihs' knowledge as to the settlement figures, his written consent to the statement of loss and the further circumstance that no appraiser was appointed, as would have been necessary in the event of a disagreement, we are not disposed to disturb the verdict upon this question of fact.

Some contention is made as to Dreihs' authority to settle without the express consent of the defendant. We believe that the record shows Dreihs' authority. The fact that he apparently handled the entire matter for defendant and acted in its behalf, and later advised them of the result of his course of conduct, indicate that he had authority to act.

the evidence also shows that Crabb, on behalf of defendant, received a "statement of loss", which, according to his testimony, he "figured" and left lying on his desk until early in January, when, as he asserts, he posted it to the agent of loss. Plaintiff says, however, that the statement of loss was posted to the other defendant shortly after the final meeting of adjusters on November 14, and not in January, as Crabb testified. Whatever the fact may be, it appears that defendant made no objection to the statement of loss until after the two other companies had settled their proportionate shares.

It thus appears that there is a conflict in the evidence as to these various circumstances bearing upon the important question of fact as to whether Crabb agreed to the final settlement figures. The jury heard the witnesses, had an opportunity to determine their credibility and received the issues in favor of plaintiff. It appears to us from an examination of the record that whether or not Crabb participated in the meeting of November 14, he was certainly advised of the settlement shortly thereafter, and neither he nor the defendant when he represented made any objection thereto until long after the other companies had paid their proportionate shares. In view of Crabb's knowledge as to the settlement figures, his written consent to the statement of loss and the further circumstance that no appraiser was appointed, as would have been necessary in the event of a disagreement, we are not disposed to disturb the verdict upon this question of fact.

Some contention is made as to Crabb's authority to settle without the express consent of the defendant. We believe that the general claims adjuster, the last that he successively handled the entire matter for defendant and acted in its behalf, and later advised them of the result of his course of conduct, indicate that he had authority to act.

It is further urged that the release being under seal, the question of consideration cannot be inquired into in a suit at law unless fraud is alleged and shown. There is no charge of fraud in the instant case, but defendant contends that the release of January 18th was given by plaintiff under seal and is, therefore, a complete bar to this suit. An examination of the original instrument shows that it was signed in the following manner:

"Andra Jankaitis,
Whitaker & Jackson
By W. H. Jackson,
A. A. Olin,
his
Anton X Klazlanski (Seal)"
mark

The receipt to which these signatures are attached is a printed document evidently prepared and used by the adjuster, and the word "seal" appearing thereon after the signature of Anton Klazlanski is part of the printed portion of the instrument. To support its contention defendant cites cases purporting to hold that where a bond or sealed instrument contains more signatures than seals, the court will presume that each signer has adopted some one of the seals attached. We have examined the authorities cited in counsel's brief and find only two cases which throw any light upon this question. Davis v. Burton, an early case reported in 3 Scammon 41, holds that where a bond or other sealed instrument purports on its face to be sealed by all the signers and there are several seals to it but not so many as there are names, the court will presume that each person signing it adopted some one of the seals and the bond will be valid against all. Relying upon this authority the court in Ryan v. Cooke, 172 Ill. 320, held to like effect. In the latter case a contract was signed by five persons, the first three of whom had the word "seal" following their reppective signatures. The court, giving expression to and emphasizing the element of intent, held that the last two signers will be presumed to have adopted the seals of those whose signatures preceded theirs.

It is further urged that the release being under seal, the question of consideration cannot be inquired into in a suit at law unless fraud is alleged and shown. There is no charge of fraud in the instant case, but defendant contends that the release of January 18th was given by plaintiff under seal not as, strictly, a release but as this suit. An examination of the original instrument shows that it was signed in the following manner:

"Andre Jankowitz,
Whitaker & Jackson
By W. H. Jackson,
A. A. Ohlin,
his
Anton X Blanchard (Seal)"
mark

The receipt to which these signatures are attached is a printed document evidently prepared and used by the adjuster, and the word "seal" appearing thereon after the signature of Anton Blanchard is part of the printed portion of the instrument. To support its contention defendant cites cases purporting to hold that where a bond or sealed instrument contains more signatures than seals, the court will presume that each signer has adopted some one of the seals attached. We have examined the authorities cited in counsel's brief and find only two cases which throw any light upon this question. Davis v. Dutton, an early case reported in 3 Bowman 41, holds that where a bond or other sealed instrument purports on its face to be sealed by all the signers and there are several seals to it but not as many as there are names, the court will presume that each person signing it adopted some one of the seals and the bond will be valid against all. Relying upon this authority the court in Ryan v. Cooper, 172 Ill. 320, held to like effect. In the latter case a contract was signed by five persons, the first three of whom had the word "Seal" following their respective signatures. The court, giving expression to and emphasizing the element of intent, held that the last two signers will be presumed to have adopted the seals of those whose signatures preceded theirs.

We have before us, however, a different situation. The document in question was signed by plaintiff and three other persons. Klazlanski's signature is the only one opposite whose name a seal appears, and under the circumstances and in the absence of any evidence, showing an intent to adopt the seal, the court cannot presume that those whose signatures appear before Klazlanski's intended to adopt his seal and sign a sealed instrument. It was so held in Ames v. Preston, et al, 20 Ill. 389, where the court said:

> "If one party executes an instrument and attaches his seal, and others afterwards sign it silently without attaching seals, they are presumed to adopt the seal of the first, and, as to all, it is a sealed instrument. If, however, the first sign without a seal, and the others add seals to their names, without the direction or consent of the first, then he cannot be presumed to adopt their seals as his, and it continues, as to him, a simple instrument, as it was when he first executed it."

Furthermore we believe that too much importance ought not to be attached to the presence of the printed word "seal" in the instrument in question, for as the court said in People v. Ford, 294 Ill. 319, in a quo warranto proceeding, where the statute required a seal and the same was omitted:

> "The requirement of a seal in the execution of documents by individuals has become a mere formality. It means nothing. Private seals no longer exist as a means of execution of specialties, for even an individual scrawl is not required. In most deeds the word 'seal' is printed on the blank form which is used and the grantor does not know whether he has used a seal or not. It depends upon whether the word was printed on the paper or not. The solemnity of the sealed instrument is purely Pickwickian and no longer represents an idea."

It is further contended that plaintiff's claim so far as the defendant is concerned remained in dispute until it was compromised in January for $4,000. If this were true, the acceptance of the above sum in settlement of a disputed claim, and in the absence of fraud, would bar plaintiff's recovery. However, the jury by its verdict settled the question whether plaintiff's claim was in dispute after November, and, as heretofore indicated, we are not disposed

We have before us, however, a different situation. The documents in question were signed by plaintiff and three other persons. Eisenmann's signature is the only one opposite where seal a was appurtenant, and under the circumstances and in the absence of any evidence, stating he intended to adopt the seal, the court should presume that these three signatures lacked before Eisenmann's intended to adopt his seal and sign a sealed instrument. It was so held in Jones v. Preston, et al, 20 III. 329, where the court said:

> "If one party executes an instrument and attaches his seal, and others afterwards sign it without affixing seals, they are presumed to adopt the seal of the first, and, so to speak, it is a sealed instrument. If, however, the first sign without a seal, and the others add seals in their order, it does not instrument an instrument of the first, nor be found to adopt their seals as his, and it consequently, is not a sealed instrument, as it was when the first executed it."

Furthermore, we believe that the most important weight not to be attached to the presence of the printed word "seal" in the instrument in question, for as the court said in Fogle v. Ford, 324 III. 519, in a mechanic proceeding, where the statute required a seal and the same was written:

> "The requirement of a seal in the execution of documents by individuals has become a mere formality. It cannot plead an larger effect as a means of examination of evidence, than even an individual manner in act required. In most cases the word 'seal' is printed on the sealed form which is used and the printed form not even affixed to the seal or not. It depends upon whether the seal was intended to be, or was, the authority of the written instrument in fact. Formalities and no longer exercised the law."

It is further contended that plaintiff's claim so far as the defendant is concerned remained in dispute until it was compromised in January for $4,000. If this were true, the acceptance of the money was in settlement of a disputed claim, and in the absence of fraud, would bar plaintiff's recovery. However, the jury by its verdict settled the question whether plaintiff's claim was in dispute after January, and, as instructions indicated, we are not inclined

to disturb the verdict upon this issue of fact, and the payment by defendant of part of a debt, the amount of which was definitely ascertained and due, did not constitute an accord and satisfaction. Morrill v. Baggott, 157 Ill. 240.

Counsel's briefs contain some discussion as to the equities of this case. It does not clearly appear whether this phase of the case was presented to the jury or not, but the argument evidently relates to a provision in the policy (page 2, line 96) reading as follows:

> "This company shall not be liable under this policy for a greater proportion of any loss * * * that the amount hereby insured shall bear to the whole insurance * * * and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto."

This provision contemplates that the defendant, under its policy, shall not bear a greater proportion of any loss than the amount insured shall bear to the whole insurance, and it would therefore be manifestly unfair that they should pay a lesser proportion of the loss than the amount insured bears to the aggregate insurance. In other words, defendant's $4,000 settlement is based upon an actual loss of only $9,000, whereas the proportionate shares paid by other insurance companies are based upon an actual loss of $13,398.36. Evidently the other companies paid their shares in reliance upon defendant's agreement to pay its proportionate share, and if there are any equities in the case, they would seem to require that defendant pay its loss upon the same basis and in the same proportion as the other companies paid theirs.

Defendant complains because the court refused to give instructions numbered three and four, but makes no argument to support its contention. We shall, therefore, assume that these objections are waived. It is also contended that the court erred in instructing the jury that the papers pasted on the back of the proof of loss were evidence of a promise on the part of the

to disturb the verdict upon this issue of fact, and the payment by defendant of part of a debt, the amount of which was definitely ascertained and due, did not constitute an accord and satisfaction.

Barrett v. Bennett, 147 Ill. 240.

Counsel's brief contains some discussion as to the validity of this case. It does not clearly appear whether this phase of the case was presented to the jury or not, but the argument invariably relates to a provision in the policy (page 9, line 28) reading as follows:

> 'The company shall not be liable under this policy for a greater proportion of any loss than the amount insured hereby bears to the whole insurance covering the property against such peril in all whole insurance, ' - and the extent of the application of the insurance under this policy of all the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto.'

This provision contemplates that the defendant, under its policy, shall not bear a greater proportion of any loss than the amount insured shall bear to the whole insurance, and it would therefore be manifestly unjust that they should pay a larger proportion of the loss than the amount insured bears to the aggregate insurance. In other words, defendant's $4,000 policy is based upon an actual loss of only $4,000, whereas the proportionate amount paid by other insurance companies are based upon an actual loss of $10,808.30. Evidently the other companies pay their shares in reliance upon defendant's agreement to pay its proportionate share, and if there are any equities in the case, they would seem to require that defendant pay its loss upon the same basis and in the same proportion as the other companies paid theirs.

Defendant complains because the court refused to give instructions numbered three and four, but makes no argument to support its contention. It shall, therefore, assume that these objections are waived. It is also contended that the court erred in instructing the jury that the papers located on the book of the proof of loss were evidence of a promise on the part of the

defendant to pay a specific amount. It appears that defendant asked the court to instruct the jury that the proof of loss should not be considered as such evidence. The court refused the instruction as offered, but modified it by inserting the words "exclusive of the papers pasted thereon", and it is contended that this had the effect of calling the jury's attention to the papers on the back of the proof of loss and inferentially telling them that those papers should be considered as proof of a promise on the part of defendant. We do not agree with this criticism of the instruction as modified. The statement of loss was competent evidence for the jury's consideration and the instruction, as given, was not, by reason of its modification, subject to the objection contended for.

Complaint is also made because the court refused to give instruction number ten on behalf of defendant. This instruction refers to a dispute between plaintiff and defendant as to the amount for which defendant was liable for damages resulting from the fire loss. It is contended that the question of whether or not there was a dispute at the time $4,000 was paid to plaintiff and a receipt taken was one of fact and should have been submitted to the jury. It appears, however, that by instruction number 11, given by the court, the jury were told in unmistakable language that if plaintiff had not proven the agreement contended for by a preponderance of the evidence, the jury should find for the defendant. The record fails to disclose that there was any serious dispute subsequent to November, 1927, and therefore there was no evidence upon which instruction number 10 could be based, and we believe that the same was properly refused.

For the reasons stated we are of the opinion that no error was committed, and accordingly the judgment of the Superior Court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

defendant to pay a specific amount. It asserts that defendant asked the court to instruct the jury that the proof of loss should not be considered as such evidence. The court refused the instruction as offered, but modified it by inserting the words "exclusive of the papers passed thereon", and it is contended that this had the effect of calling the jury's attention to the papers on the back of the proof of loss and inferentially telling them that these papers should be considered as proof of a release on the part of defendant. We do not agree with this criticism of the instruction as modified. The statement of loss was competent evidence for the jury's consideration and the instruction, as given, was not, by reason of its modification, subject to the objection urged.

Defendant is also made bewore the court refused to give instruction number ten on behalf of defendant. This instruction refers to a dispute between plaintiff and defendant as to the amount for which defendant was liable for damages resulting from the fire loss. It is contended that the question of whether or not there was a dispute at the time $4,000 was paid to plaintiff and a receipt taken was one of fact and should have been submitted to the jury. It appears, however, that by instruction number 11, given by the court, the jury were told in unmistakable language that if plaintiff had not proven the agreement contended for by a preponderance of the evidence, the jury should find for the defendant. The record fails to disclose that there was any serious dispute subsequent to November, 1927, and therefore there was no evidence upon which instruction number 10 could be based, and we believe that the case was properly refused.

For the reasons stated we are of the opinion that no error was committed, and accordingly the judgment of the superior court will be affirmed.

AFFIRMED.

Filed: T.A. Ad. Ct., V. Term.

34406

WILLIAM A. KOBER and GERTRUDE S. KOBER,

Appellees,

v.

ALVA H. KROM and WINIFRED C. KROM,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

261 I.A. 647

Opinion filed April 15, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This is an action in assumpsit to recover damages for breach of a real estate contract, by the terms of which the plaintiffs agreed to sell and the defendants to purchase certain real estate in the City of Chicago. The case was tried before a jury, which rendered a verdict in favor of the plaintiffs for the sum of $2,100, on which verdict judgment was entered by the court, and from which the defendants appeal.

It appears from the evidence that William A. Kober, one of the plaintiffs, who acted for Gertrude S. Kober, his wife and co-plaintiff, became acquainted with the defendant Alva H. Krom, in March, 1927; that the defendant informed the plaintiff that he was interested in purchasing the plaintiffs' building located at 4445-47 Clifton avenue in the City of Chicago; that the defendant Alva H. Krom , together with the plaintiff William A. Kober, and plaintiffs' tenant, Amodt, inspected both the exterior and the interior of the building in March; that this building was leased to Amodt in April, 1927, at a rental of $425 per month, and was being used by him as a rooming house.

That on May 20, 1927, both of the parties executed a written contract for the purchase of plaintiffs' building; that the contract is in the form of a real estate exchange contract, and

Opinion filed April 12, 1927.

Mr. JUSTICE HAMMOND delivered the opinion of the court.

This is an action in assumpsit to recover damages for breach of a real estate contract, by the terms of which the plaintiffs agreed to sell and the defendants to purchase certain real estate in the city of Chicago. The case was tried before a jury, which rendered a verdict in favor of the plaintiffs for the sum of $7,150, on which verdict judgment was entered by the court, and from which the defendants appeal.

It appears from the evidence that William A. Kober, one of the plaintiffs, who acted for themselves S. Kober, his wife and co-plaintiff, became acquainted with the defendant Alva E. Krom, in March, 1927; that the defendant informed the plaintiff that he was interested in purchasing the plaintiffs' building located at Sixty-sixth avenue in the city of Chicago; that the defendant Alva E. Krom, together with the plaintiff William A. Kober, and plaintiffs' agent, Smith, inspected with the exterior and the interior of the building in March; that this building was leased to Smith in April, 1927, at a rental of $125 per month, and was being used by him as a rooming house.

That on May 30, 1927, both of the parties executed a written contract for the purchase of plaintiffs' building; that the contract is in the form of a real estate exchange contract, and

provides in substance that plaintiffs are to convey their property to the defendants for a consideration of $41,000, which is to be paid for by the defendants by the assumption of a first mortgage of $14,000; by the execution of a second mortgage for the sum of $20,000, and by the delivery by the defendants to the plaintiffs of a $7,000 mortgage on certain property in Los Angeles, California; that upon delivery of the abstract of title the defendants shall, within ten days after receipt thereof, deliver to the plaintiffs or their agent, a note or memorandum in writing, signed by them or their attorney, specifying in detail the objection they make to the title, if any, and that the plaintiffs shall have sixty days after notice of such objection to cure any defects so specified.

That the abstract of title to the property was brought down, and on June 8, 1927, was deposited by the plaintiffs, together with a signed copy of the contract and the lease of the premises, with John Senz, cashier of the Fidelity Trust and Savings Bank of Chicago, whom Alva H. Krom, one of the defendants, suggested as an escrow agent; that the abstract was turned over by Senz to the defendants for examination; that on June 14, 1927, the plaintiff William A. Kober, wrote the defendants accepting the trust deed on the Los Angeles property. On the next day the plaintiffs received a letter from the defendant Alva H. Krom, stating that he had received a letter from his attorney, after an examination of the abstract, to the effect that the United States Government had a lien on the property; that on June 22, 1927, the defendants wrote and mailed to the plaintiff William A. Kober, a post card advising the plaintiffs that the defendants had sent final instruttions to Senz and that plaintiff should call at the bank to see Senz, which he did, and that Senz told the plaintiff that he had received a letter from the defendants asking him to cancel the contract, but that he was not acting as agent for either party, but was merely holding the papers for both

writing in substance that plaintiffs are to convey their property to the defendants for a consideration of $4,000, which is to be paid for by the defendants by the assumption of a first mortgage of $14,000; by the execution of a second mortgage for the sum of $10,000, and by the delivery by the defendants to the plaintiffs of a $7,000 mortgage on certain property in Los Angeles, California; that upon delivery of the abstract of title the defendants shall, within ten days after receipt thereof, deliver to the plaintiffs or their agent, a note as mentioned in writing, signed by them or their attorney, specifying in detail the objection they make to the title, if any, and that the plaintiffs shall have sixty days after notice of such objection to make any defects so specified.

That the abstract of title to the property was brought down, and on June 8, 1927, was delivered by the plaintiffs, together with a signed copy of the contract and the lease of the premises, with John Dunn, president of the Fidelity Trust and Savings Bank of Chicago, also six C. Ryan, one of the defendants, suggested to an agent; that the abstract was turned over by them to the defendants for examination; that on June 14, 1927, the plaintiff William A. Baker, wrote the defendants accepting the trust deed on the Los Angeles property. On the same day the plaintiffs received a letter from the defendant Six K. Ryan, stating that he had received a letter from his attorney, after an examination of the abstract, to the effect that the United States Government had a lien on the property; that on June 23, 1927, the defendants wrote and mailed to the plaintiff William A. Baker, a post card advising the plaintiff that the defendants had sent final instructions to Dunn and that plaintiff should call at the bank to see Dunn, which he did, and then Dunn told the plaintiff that he had received a letter from the defendants asking him to cancel the contract, but that he was not acting as agent for either party, but was merely holding the papers for both

of them; that the plaintiff immediately took the abstract from Benz and brought it to his attorney Morrison to have the defect mentioned in the defendant's letter removed; that on June 30, 1927, Morrison wrote the defendants that he had conferred with the United States Assistant Attorney General with respect to the consent decree and that under the circumstances and in view of the fact that the plaintiffs had not been served with any notice of the proceeding, the government had no objection to the vacation of this decree and the dismissal of the suit; that on July 14, 1927, on motion of the United States Assistant Attorney General, the decree in said suit was vacated and set aside and the bill of complaint dismissed; that immediately upon the vacation of such decree Morrison took a certified copy of the order to the Chicago Title & Trust Company, which noted the dismissal of the suit on the abstract; that thereafter, on July 20, Morrison wrote the defendants and Benz that the decree had been vacated; that on August 4 the plaintiff William A. Kober, wrote the defendants and Benz that on August 15 he would appear at the Fidelity Trust & Savings Bank and tender performance of the contract and call upon the defendants to perform the latter's part of the contract; that on August 15, the plaintiffs tendered a warranty deed to the property, which was refused by one Kahn, an officer of the bank, who stated that he could do nothing in the absence of the defendants and Benz. About the time the tender was made at the bank, plaintiff William A. Kober met the defendant Alva M. Krom, in Chicago and told him that the plaintiffs were still ready to go through with the deal; that the defendant replied that he would confer with his attorney and get the abstract for further examination; that shortly after the 22nd of August, 1927, the defendant authorized his attorney, Robert Holmes, to take the abstract from Benz and make an examination of the same, which he did, and on September 6th wrote to Morrison, plaintiffs' attorney, and told him that he had returned the abstract and letters to Benz,

of them; that the plaintiff successfully took the observer from Iowa and brought it to his attorney Harrison to have the defect mechanical in the defendant's letter received; that on June 20, 1927, Harrison wrote the defendants that he had conferred with the United States Patent Office Department with respect to the subject device and that under the circumstances and in view of the fact that the plaintiff had not been served with any Writs of the Attorney, the government had no objection to the vacation of this decree and the dismissal of the suit; that on July 14, 1927, on motion of the United States Assistant Attorney General, the decree in said suit was vacated and set aside and the bill of complaint dismissed; that immediately upon the execution of such decree Harrison sent a certified copy of the order to the Chicago Title & Trust Company, which moved the dismissal of the suit on the docket; that thereafter, on July 20, Harrison wrote the defendants and then that the decree had been vacated; that on August 4 the plaintiff William H. Ruser, wrote the defendants and then that on August 15 he would appear at the plaintiff's Iowa home and vacate petitioners of the contract and call upon the defendants to perform the latter's part of the contract; that on August 16, the plaintiffs tendered a warranty deed to the property, which was refused by one Kahn, an officer of the bank, who stated that he could do nothing in the absence of the defendants and then. About the time the tender was made at the bank, plaintiff William H. Ruser met the defendant Alan H. Ruse, in Chicago and said him that the plaintiffs were still ready to go through with the deal; that the defendant replied that he would confer with his attorney and get the abstract for further examination; that shortly after the 22nd of August, 1927, the defendant authorized his attorney, Robert Nelson, to take the abstract from the bank and make an examination of the same, which he did, and on September 8th wrote to Harrison, plaintiffs' attorney, and said his part of the transaction the abstract had failed to show

and that the defendants were unwilling to consummate the deal because of the consent decree and because of insufficiencies in the lease of plaintiffs' property.

The plaintiffs contend that while the defendants assign as error, and argue that the judgment is contrary to the law and the evidence, such objection is not available to the defendants, inasmuch as the motion for a new trial and the order overruling the same are not preserved in the bill of exceptions.

From an examination of the transcript of record it appears that the motion for a new trial and the ruling thereon were not incorporated in the bill of exceptions. Failure to include the motion for a new trial and the ruling of the trial court does not bring before this court for review the question of the sufficiency of the evidence to sustain the verdict. The rule applicable to a case of this kind is stated in the case of The People v. Gabrys, 339 Ill. 101, wherein the Supreme Court uses this language:

> "To permit a review of an order denying a motion for a new trial the bill of exceptions must show that such a motion was made and the order of the court denying the same. The only method by which these questions can be preserved is by a bill of exceptions. (Gall v. People, 201 Ill. 499; Harris v. People, 130 id. 457.) In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict it is necessary that the losing party make a motion for a new trial, and upon its being overruled except to such ruling, and to include such motion, the order overruling the same and exceptions thereto, together with the evidence, in a bill of exceptions. (Yarber v. Chicago and Alton Railway Co. 235 Ill. 589.) No motion for new trial, with the ruling thereon, having been preserved in the bill of exceptions, this court cannot review the sufficiency of the evidence."

The recital by a clerk in a common law record that a motion for a new trial was made and overruled is not sufficient and does not preserve the question on appeal unless included in the bill of exceptions. Greenwell v. Ness, 298 Ill. 459.

It does not appear in the transcript of the record that the defendants objected to the giving or refusing of the

and that the defendants were unwilling to consummate the deal because of the seller's failure and because of insufficiency in the issue of plaintiff's property.

The plaintiff contends that which the defendants assign as error, and argue that the judgment is contrary to the law and the evidence, such allegation is not available on the affidavits, because on the motion for a new trial and the order overruling the same are not presented in the bill of exceptions.

From an examination of the transcript of record it appears that the motion for a new trial and the ruling thereon were not incorporated in the bill of exceptions. Failure to include the motion for a new trial and the ruling of the trial court does not bring before this court for review the question of the sufficiency of the evidence to sustain the verdict. The rule applicable to a case of this kind is stated in the case of The People v. Sherry, 329 Ill. 101, wherein the Supreme Court uses this language:

"In permit a review of an order denying a motion for a new trial the bill of exceptions must show that such a motion was made and the ruling of the court denying the same. The only method by which these conditions can be preserved is by a bill of exceptions. (Gall v. People, 201 Ill. 499; Sterrie v. People, 150 id. 467.) In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict, the losing party must make a motion for a new trial, and upon his being overruled, insist on such ruling, and to insure such action, the order overruling the same and exceptions thereto, together with the evidence, in a bill of exceptions. (Parker v. Ulrich and also Malony, 218 Ill. 209.) In order for the trial, with the ruling thereon, being made preserved in the bill of exceptions, this court cannot review the sufficiency of the evidence."

The recital by a clerk in a common law record that a motion for a new trial was made and overruled is not sufficient and does not preserve the question on appeal unless included in the bill of exceptions. Lynnwood v. Ryan, 328 Ill. 488.

It does not appear in the transcript of the record that the defendants objected to the giving or refusing of the

instructions offered, nor does it appear at whose request the instructions were given or refused; and, further, the record does not disclose that all of the instructions offered were incorporated in the bill of exceptions. It is impossible to ascertain from the record at whose request the instructions were offered, which is important in order to review such instructions. In view of the record, this court is unable to pass upon the errors assigned on that phase of the case.

The defendants argue that the court erred in admitting improper evidence offered by the plaintiffs, and complain that a witness for the plaintiffs in testifying made use of a memorandum. The trial court may in its discretion permit or deny the use of a memorandum to refresh the recollection of a witness, and where the court permits a witness to refresh his recollection over objection, such action by the court will not be considered erroneous, unless the action of the court is clearly prejudicial. The defendants failed to make a motion to strike such evidence from the record, and they do not point out in what respect the use of a memorandum by the witness for the plaintiffs was prejudicial.

The next point to be considered is the conversation of the plaintiff William A. Kober with one John Benz, which was had out of the presence of the defendant. It seems from the evidence that the plaintiff received a postal card from the defendant advising him to call at the Fidelity Trust & Savings Bank to see Benz, to whom the defendant has sent final instructions regarding the subject of this controversy. The facts would indicate that Benz was to transmit the instructions of the defendants to the plaintiffs and it necessarily follows that the conversation with respect to the instructions was properly admitted in evidence. This conversation was made competent from the fact that the defendants directed the plaintiff William A. Kober, to call on Benz, who was to advise the plaintiffs of the instructions given by the defendants.

instructions offered, nor does it appear at whose request the instructions were given or refused; and, further, the record does not disclose that all of the instructions offered were incorporated in the bill of exceptions. It is impossible to ascertain from the record at whose request the instructions were offered, which is important in order to review such instructions. In view of the record, this court is unable to pass upon the errors assigned on that phase of the case.

The defendants argue that the court erred in admitting injury evidence adduced by the plaintiffs, and specifically that a witness for the plaintiffs in testifying made use of a memorandum. The trial court may in its discretion permit or deny the use of a memorandum to refresh the recollection of a witness, and where the party permits a witness to refresh his recollection over objection, such action by the court will not be considered erroneous, unless the action of the court is clearly prejudicial. The defendants failed to make a motion to strike such evidence from the record, and they do not point out in what respect the use of a memorandum by the witness for the plaintiffs was prejudicial.

The next point to be considered is the conversation of the plaintiff William A. Baker with one John Bonn, which was had out of the presence of the defendant. It seems from the evidence that the plaintiff received a postal card from the defendant advising him to call at the Liberty Trust & Savings Bank to see Bonn, in whom the defendant has made final instructions regarding the subject of this controversy. The facts would indicate that Bonn was to transmit the instructions of the defendants to the plaintiffs and it necessarily follows that the conversation with respect to the instructions was properly admitted in evidence. This conversation was made competent from the fact that the defendants directed the plaintiff William A. Baker, to call on Bonn, who was to advise the plaintiffs of the instructions given by the defendants.

The defendants further contend that the court erred in overruling the objections of the defendants to the admissibility of evidence as to acts that took place after June 23, 1927, when, it is claimed, the defendants cancelled the contract. It appears that the defendant Alva M. Krom wrote to Benz asking him to cancel the contract with the plaintiffs. The plaintiffs' theory is that under the terms of the contract they were permitted to remedy the alleged defect in their title, and that they proceeded to do so and notified the defendants to that effect. The evidence also shows that the plaintiffs made a tender to the defendants on August 15, 1927, of the deed conveying title; that thereafter the plaintiff William A. Kober met the defendant Alva M. Krom and in that conversation the defendant stated that he would have his attorney examine the abstract again, and subsequent thereto the defendants' attorney examined the abstract and wrote to the plaintiffs' attorney on September 6, 1927, stating the result of his examination and declining to accept the title.

Negotiations having been resumed and continued to September 8th, the evidence as to all conversations and transactions which took place up to that time, was properly admitted by the court, and when the defendants finally declined to accept title, it was not necessary for the plaintiffs to make a further tender of the deed to the property in question. A tender would have been unavailing in view of defendants' refusal to perform. The rule of law is, as stated by the Supreme Court in the case of Bucklen v. Masterlik, 155 Ill. 423;

> "that a tender is never required, nor is its omission ever prejudicial, where, from the circumstances, it is clear that such tender, if made, would have been refused. The law does not require the performance of a mere idle act, or one which would be useless, and appellant had never, at any time, indicated that if the deed were tendered on this title he would accept it. Where a vendee objects to a title, a tender of a deed which he declares he will not accept is unnecessary.

The defendants further contend that the court erred in overruling the motions of the defendants to the admissibility of evidence as to acts that took place after June 23, 1927, when, it is claimed, the defendants cancelled the contract. It appears that the defendant Alva E. Knox wrote to Dana asking him to cancel the contract with the plaintiffs. The plaintiffs' theory is that under the terms of the contract they were permitted to remedy the alleged defect in their title, and that they proceeded to do so and notified the defendants to that effect. The evidence also shows that the plaintiffs made a tender to the defendants on August 10, 1927, of the deed covering title; that thereafter the plaintiff William A. Kaber and the defendant Alva E. Knox met in that conversation the defendant stated that he would have his attorney examine the abstract again, and subsequent thereto the defendants' attorney returned the abstract and wrote to the plaintiffs' attorney on September 6, 1927, stating the result of his examination and declining to accept the title.

Negotiations having been resumed and continued to September 23th, the evidence as to all conversations and transactions which took place up to that time, was properly admitted by the court, and when the defendants finally declined to accept title, it was not necessary for the plaintiffs to make a further tender of the deed to the property in question. A tender would have been unavailing in view of defendants' refusal to perform. The rule of law is, as stated by the Supreme Court in the case of Hoskins v. Hatcville, 124 Ill. 477;

"Just a tender is never required, nor is it making over payment, when the creditor declares, it is stated that such tender, if made, would have been refused. The law does not require the performance of a mere idle act, or one which would be useless, and equivalent but never, at any time, indicated that if the deed was tendered him title would be equal to it. Does a vendee undertake to a title, a tender of a deed which he declares he will not accept is unnecessary.

Hampton v. Speckenagle, 9 S. & R. 212; Tierman v. Roland 15 Pa. St. 429; Lyman v. Gedney, 114 Ill. 388; Gunter v. Daniel, 4 Mars, 420; Webster v. French, 11 Ill. 254; Shepler v. Green, 31 Pac. Rep. 42."

Contention is also made by the defendants that certain exhibits in evidence were wholly incompetent; that they referred to transactions that took place subsequent to the breach by the defendants. It appears from the record that objections were made to certain exhibits and not to others in evidence. To the exhibits to which no objections were made, the defendants cannot complain at this time. The opportunity was afforded at the time of the trial to object and the defendants not having done so, they cannot on appeal raise the question of the competency of such exhibits. As to the other exhibits in the record to which objections were made, the court does not find such error as would justify a reversal on the ground contended for by the defendants.

It is urged by the defendants that the verdict was a compromise verdict, for the reason that the amount was less than the evidence justified, and that the jury arrived at the verdict by splitting the difference between the amount claimed and the amount returned. If the verdict is for less than the plaintiffs' evidence shows they are entitled to, the defendants cannot complain. Jones v. Bates, 179 Ill. App. 578.

For the reasons indicated, this court is unable to find that the trial court erred, and therefore the judgment is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

Bowman v. Schwenneker, 4 T. & A. 114; Thomas v. Dakins, 12 Ill. 43; Young v. Hunter, 12 Ill. 203; Hughes v. Moore, 4 Brad. 444; Wheeler v. Wheeler, 12 Ill. 148; Hunter v. Jones, 12 Ill. 405.

Contention is also made by the defendants that certain exhibits in evidence were improperly; that they returned to conversations that took place subsequent to the breach by the defendants. It appears from the record that objections were made to certain exhibits and not to others in evidence. To the exhibits to which no objections were made, the defendants cannot complain at this time. The opportunity was afforded at the time of the trial to object and the defendants not having done so, they cannot on appeal raise the question of the competency of such exhibits. As to the other exhibits in the record to which objections were made, the court does not find such error as would justify a reversal on the ground contended for by the defendants.

It is urged by the defendants that the verdict was a compromise verdict, for the reason that the amount was less than the evidence justified, and that the jury arrived at the verdict by splitting the difference between the amount claimed and the amount returned. If the verdict is for less than the plaintiffs' evidence shows they are entitled to, the defendants cannot complain. Jones v. Bates, 17 Ill. 405.

For the reasons indicated, this court is unable to find that the trial court erred, and therefore the judgment is affirmed.

AFFIRMED.

Allen, P.J. and Dillon, J. concur.

34445

EDWARD HEARY,
Appellee,
v.
GLEASON-NOTH BAKING CO.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

261 I.A. 648

Opinion filed April 15, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

The plaintiff sued the defendant in the Municipal Court of Chicago for breach of an alleged contract. The case was tried before the court without a jury, and the finding of the court was for the plaintiff and judgment was entered against the defendant for $173.35. This appeal is by the defendant.

The plaintiff filed his statement of claim on December 10, 1929, alleging that the defendant was indebted to him in the sum of $162.35, for labor and material for plaster patching done by him for the defendant on September 17, 1928, and subsequent thereto, which sum the defendant had not paid to the plaintiff, although personally requested to do so; and that the defendant had vexatiously refused and neglected to pay said sum.

The defendant filed its affidavit of merits to the effect that it had a good defense; that the defendant did not employ or engage plaintiff to furnish any labor or material, nor to perform any work for the defendant at any time, and that the defendant was not indebted to the plaintiff.

It appears from the evidence that the defendant rented a certain space in a building known as No. 958 Willow Street, Chicago, Illinois, from Henry Noth, the owner; that the owner employed the Neff Construction Co. to remodel parts of the building not occupied by the defendant; that the plaintiff was a plastering contractor and was employed by the Neff Construction Co. to do

Opinion filed April 15, 1933

Mr. JUSTICE DUFFY delivered the opinion of the court.

The plaintiff sued the defendant in the municipal court of Chicago for breach of an alleged contract. The case was tried before the court without a jury, and the finding of the court was for the plaintiff and judgment was entered against the defendant for $197.50. This appeal is by the defendant.

The plaintiff filed his statement of claim on December 10, 1930, alleging that the defendant was indebted to him in the sum of $197.50, for labor and material for plaster patching done by him for the defendant on September 17, 1928, and subsequent thereto, which sum the defendant had not paid to the plaintiff. Although personally served in the suit and that the defendant had positively refused and neglected to pay said sum.

The defendant filed his affidavit of merits to the effect that it has a good defense; that the defendant did not employ or engage plaintiff to furnish any labor or material, nor to perform any work for the defendant at any time, and that the defendant was not indebted to the plaintiff.

It appears from the evidence that the defendant rented a certain space in a building known as No. 888 Wilson Street, Chicago, Illinois, from Henry Roth, the owner; that the owner employed the Duff Construction Co. to remodel parts of the building not occupied by the defendant; that the plaintiff was a plastering contractor and was employed by the Duff Construction Co. to do

the plastering in the parts of the building being remodeled; that a gas explosion occurred on the floor above the premises occupied by the defendant and that some of the plastering in the defendant's premises was damaged and in need of repair.

The plaintiff testified that Monroe Roth, the treasurer of the defendant corporation, directed him to repair the plastering which had been damaged in the defendant's premises; that he accordingly patched the plastering in the places damaged; that the value of the labor and material was $163.25; that he sent bills to the defendant, and that the defendant refused to pay them, but offered him $75.00 in full payment of the claim.

The evidence of the defendant is to the effect that Henry Roth, the owner of the building, directed the plaintiff to do the work and agreed to pay him a fair price therefor; that no contract was made with the plaintiff by the defendant, and that Henry Roth was responsible for the work and had refused to pay the plaintiff's bill only because the amount charged was excessive. It is undisputed that the plaintiff did the plastering work in question.

The question upon the facts was decided by the trial court, and in doing so it passed upon the weight of the evidence. The trial court being in a better position than this court to pass upon the credibility of the witnesses who appeared and testified, we will not disturb the finding unless the judgment is against the manifest weight of the evidence, and upon careful consideration of the evidence, we are not disposed to reverse on that ground.

It is contended by the defendant that the plaintiff did not make proof of the amount of the labor and value of the materials used, except to testify that the amount and value of the work done and materials furnished was $163.25.

The defendant's affidavit of merits does not raise the

the plastering in the parts of the building being remodeled; that a gas explosion occurred on the floor above the premises occupied by the defendant and that some of the plastering in the defendant's premises was damaged and in need of repair.

The plaintiff testified that Morse Roth, the treasurer of the defendant corporation, directed him to repair the plastering which had been damaged in the defendant's premises; that he accordingly patched the plastering in the places damaged; that the value of the labor and material was $100.35; that he sent bills to the defendant, and that the defendant refused to pay them, but offered the $75.00 in full payment of the bills.

The evidence of the defendant is to the effect that Henry Roth, the owner of the building, directed the plaintiff to do the work and agreed to pay him a fair price therefor; that no contract was made with the plaintiff by the defendant, and that Henry Roth was responsible for the work and refused to pay the plaintiff's bill only because the amount charged was excessive. It is undisputed that the plaintiff did the plastering work in question.

The question upon the facts was decided by the trial court, and in doing so it passed upon the weight of the evidence. The trial court being in a better position than this court to pass upon the credibility of the witnesses who appeared and testified, we will not disturb the finding unless the judgment is against the manifest weight of the evidence, and upon careful consideration of the evidence, we are not disposed to reverse on that ground.

It is contended by the defendant that the plaintiff did not make proof of the amount of the labor and value of the materials used, except to testify that the amount and value of the work done and materials furnished was $100.35.

The defendant's affidavit of merits does not raise the

issue that the amount sued for was excessive, but limits its defense to whether or not the defendant employed or engaged the plaintiff to perform any labor or furnish any material, or perform any work for the defendant at any time, and having limited the issue, it was too late to urge any defense not set forth in the affidavit of merits. Humphreys v. Grrey, 280 Ill. App. 582.

It is also contended by the defendant that the court erred in adding $11.00 interest to the amount claimed, on the ground that the delay was vexatious. The work was completed on September 17, 1928, and the plaintiff was obliged to start suit on December 10, 1929, after the plaintiff had submitted several bills for the work and labor performed and payment had been refused by the defendant.

Under the issue presented by the affidavit of merits a reasonable charge for the work and material was not in issue, and under the pleadings and evidence the trial court was justified in finding the issues for the plaintiff.

We find from the record that the trial court did not err in entering judgment for the plaintiff and against the defendant. The judgment is accordingly affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

issue that the owners were too one-sided, but limits the defense to whether or not the defendant engaged in engaging the plaintiff to perform any lawful or illegal act, or whether any act was the defendant at any time, and having limited the issue, it was too late to stir up defense not put forth in the affidavit of merits. MONTGOMERY v. SMITH, 100 Ill. App. 624.

It is also contended by the defendant that the court erred in adding $13.00 interest to the amount claimed, on the ground that the delay was voluntary. The writ was executed on September 17, 1929, and the plaintiff was obliged to wait until December 10, 1929, after the plaintiff had submitted several bills for the work and labor performed and furnished by the defendant.

Under the issue presented by the affidavit of merits a reasonable charge for the work and material was not in issue, and under the pleadings and evidence the trial court was justified in finding the issues for the plaintiff.

We find from the record that the trial court did not err in entering judgment for the plaintiff and against the defendant. The judgment is accordingly affirmed.

AFFIRMED.

WILSON, P.J. AND SCHWEN, J. CONCUR.

34460

PETER BRANSON and PETRONELA BRANSON,

Appellees,

v.

AUGUST FOCIUS and ANELE FOCIUS,

Appellants.

APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

261 I.A. 648

Opinion filed April 15, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This is an appeal by the defendants from an order entered in the Municipal Court of Chicago on March 10, 1930, denying the motion of the defendants in the nature of a writ of error coram nobis, under Section 88, Chapter 110, Cahill's Ill. Rev. Stats. to vacate a judgment entered on June 5, 1929.

The plaintiffs brought suit against the defendants in the Municipal Court. The case was at issue and set for trial on the jury calendar. On June 5, 1929, an ex parte judgment was entered against the defendants for the sum of $2250. Thereafter the defendants made a motion and filed two petitions in the Municipal Court to set aside the judgment, and after filing the motion and the two petitions in question filed a bill in equity.

A demurrer was filed to said bill and sustained, after which the defendants filed a petition in the nature of a writ of error coram nobis in the Municipal Court, and thereafter, by leave of court, on January 20, 1930, filed an amended petition to the same effect.

The court before hearing evidence on the amended petition, procured from the parties a waiver of all formalities of pleadings. Evidence was tendered and heard for both parties, and thereafter the court entered an order denying the motion of the defendants.

Opinion filed April 11, 1921

MR. JUSTICE [illegible] delivered the opinion of the court.

This is an appeal by the defendants from an order entered in the Municipal Court of Chicago on March 10, 1921, overruling the motion of the defendants to the writers of a writ of error coram nobis, under Section 89, Chapter 110, Hurd's Rev. Stats., to vacate a judgment entered on June 5, 1920.

The plaintiffs brought suit against the defendants in the Municipal Court. The case was at issue and set for trial on the jury calendar. On June 5, 1920, an ex parte judgment was entered against the defendants for the sum of $2250. Thereafter the defendants made a motion and filed two petitions in the Municipal Court to set aside the judgment, and after filing the motion and the two petitions in question filed a bill in equity.

A demurrer was filed to said bill and sustained, after which the defendants filed a petition in the nature of a writ of error coram nobis in the Municipal Court, and thereafter, by leave of court, on January 20, 1920, filed an amended petition to the same effect.

The court before hearing evidence on the amended petition, presented from the granting a writer of all formalities of pleadings. Evidence was tendered and heard for both parties, and thereafter the court entered an order denying the motion of the defendants.

It is the contention of the defendants that the amended petition set up sufficient facts showing a default of the Clerk of the Municipal Court in failing to properly enter the order of the court continuing the case for trial until July 15, 1929, instead of June 5, 1929, on which latter date an ex parte judgment was entered.

The evidence on behalf of defendants is that Victor Frohlich is an attorney licensed to practice, and was the attorney for the defendants, although his appearance was not entered of record; that he was ill for several weeks prior to May 13, 1929, and confined to his home; that a short time prior to May 13, 1929 he called, Thomas J. Doyle, an attorney, and asked him to watch and take care of this case when it was reached for trial; that Doyle appeared in the Municipal Court on May 13, when the case was called, requested that it be continued by the court until July 15, 1929 and made a memorandum in his notebook of the date; that on July 15, 1929, the case was not on the court call; that Frohlich learned from the files in the case that an ex parte judgment was entered on June 5, 1929.

There is evidence to the effect that there was an erasure on the left hand side of the envelope containing the files. It also appears from the record that one Paul Edelstein testified, at the request of the plaintiffs, to the effect that he appeared in the Municipal Court on May 13, 1929; that he answered several other court calls, left the court room before the case was reached; returned later and found that the case was set for June 5, 1929. One Henry E. Jacobs, an attorney who appeared for the plaintiffs on the trial, testified that on July 15, 1929, he examined the envelope on which there were marks, also what is called the half sheet, which was in the envelope and on which was kept a record of the orders in the case; that there was no mark, sign or any indication whatever that the case had been continued to July 15. 1929.

It is the contention of the defendants that the amended petition set up sufficient facts showing a default of the clerk of the municipal Court in failing to properly enter the order of the court continuing the case for trial until July 12, 1929, instead of June 6, 1929, on which latter date an ex parte judgment was entered.

The evidence on behalf of defendants is that Victor Frohlich is an attorney licensed to practice, and was the attorney for the defendants, although his appearance was not entered of record; that he was ill for several weeks prior to July 12, 1929, and confined to his home; that a short time prior to July 12, 1929 he called, Thomas J. Doyle, an attorney, and asked him to watch and take care of this case when it was reached for trial; that Doyle appeared in the municipal Court on July 12, when the case was called, requested that it be continued by the court until July 12, 1929 and made a memorandum in his notebook of the date; that on July 12, 1929, the case was not on the court call; that Frohlich learned from the files in the case that an ex parte judgment was entered on June 6, 1929.

There is evidence to the effect that there was an entry on the left hand side of the envelope containing the files. It also appears from the record that one Joel Edelstein testified, at the request of the plaintiff, to the effect that he appeared in the municipal Court on July 12, 1929; that he answered several other cases ahead, left the court room before the case was reached; returned later and found that the case was set for June 6, 1929. One Henry S. Jacobs, an attorney who appeared for the plaintiff on the trial, testified that on July 12, 1929, he examined the envelope on which there were marks, also what is called the bail sheet, which was in the envelope and on which was kept a record of the orders in the case; that there was no mark, sign or any indication whatever that the case had been continued to July 12, 1929.

The Minute Clerk of the Municipal Court, who was present and acted when the case was called and continued, was not called as a witness, nor was the record produced before the trial court.

The facts in evidence as to the date when the case was set for trial are disputed. Therefore, there is but one question for this court to pass upon, and that is, was the evidence, by its manifest weight, contrary to the order entered by the court?

This court has examined the record, and we are unable to find that the trial court erred in finding as it did. In determining the questions involved in this proceeding, we have considered the reasons offered by the trial court at the time of the entry of the order, but they are not of controlling importance, provided from the record the order was a proper one.

The trial court heard the matter on its merits as a question of fact, and entered an order denying the motion of the defendants, and there being no reversible error, this court will affirm the order denying the motion of the defendants to vacate the judgment.

ORDER AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

The Black Judge of the Municipal Court, who was present and noted also the mole was called and examined, was not called as a witness, nor was the record produced before the trial court.

The facts in evidence as to the date when the case was set for trial are disputed. Therefore, there is but one question for this court to look upon, and that is, was the evidence, by its smallest weight, contrary to the order entered by the court?

This court has examined the record, and we are unable to find that the trial court erred in finding as it did. In sustaining the questions involved in this proceeding, we have examined the reasons alleged by the trial court as the time of the entry of the order, but they are not of controlling importance, provided that the record the order was a proper one.

The trial court under the matter in the matter as a question of law, and entered an order denying the motion of the defendant, and never being to substantial error, this court will affirm the order denying the motion of the defendants to vacate the judgment.

"JOHN DIRKERS.

WILSON, P.J. AND PETERS, J. CONCUR.

34463

LEO HALPER,
Appellee,
v.
MAYTAG-CHICAGO COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

579 A

261 I.A. 648

Opinion filed April 15, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This suit was filed in the Municipal Court of Chicago by the plaintiff against the defendant to recover the sum of $250, for five months rent of the store located at 2446 West 47th Street, Chicago, alleged to have been rented and occupied by the defendant. The case was heard by the court, after a jury was waived, and at the conclusion of the trial a judgment was entered in favor of the plaintiff and against the defendant for this sum. The case is now in this court on appeal.

The store of the plaintiff was occupied by one Swarts, who was in charge for the defendant, after a Mr. Burch, renting agent for the defendant, stated to the plaintiff that the defendant company was going to put Swarts in the premises to run the store for the defendant.

The sum of $50.00 was agreed upon as the monthly rental and the plaintiff was paid the June, 1927 rent, and Burch sent the plaintiff a check for the July rent, which was returned for want of sufficient funds. After Burch was notified of this fact he mailed defendant's check to the plaintiff, which was paid. The premises were occupied for a period of five months at a monthly rental of $50.00, which was not paid. The Maytag washing machines were in the store, and a large Maytag sign was displayed on the front of the building.

Opinion filed April 15, 1921

Mr. JUSTICE BROWN delivered the opinion of the court.

This suit was filed in the municipal court of Chicago by the plaintiff against the defendant to recover the sum of $300, for five months rent of the store located at 3448 West 47th Street, Chicago, alleged to have been rented and occupied by the defendant. The case was heard by the court, after a jury was waived, and at the conclusion of the trial a judgment was entered in favor of the plaintiff and against the defendant for this sum. The case is now in this court on appeal.

The store of the plaintiff was occupied by one Smith, who was in charge for the defendant, after a Mr. Burch, renting agent for the defendant, stated to the plaintiff that the defendant company was going to put barbers in the premises to run the store for the defendant.

The sum of $300.00 was agreed upon as the monthly rental and the plaintiff was paid the June, 1917 rent, and Burch sent the plaintiff a check for the July rent, which was returned for want of sufficient funds. After Burch was notified of this fact he mailed defendant's check to the plaintiff, which was paid. The premises were occupied for a period of five months at a monthly rental of $80.00, which was not paid. The barber washing machines were in the store, and a large barber sign was displayed on the front of the building.

The trial was commenced and continued after the close of the plaintiff's case, on motion of the defendant's attorney, to February 27, 1930, and on that date the case was called for further hearing. The plaintiff was again called to the stand, over the objection of the defendant, and testified, in substance, that the officer to whom he talked and whose name he could not give at a previous hearing, was the President of the Company, and that his name is Charles Kratch.

The plaintiff further testified that when he was at the office of the defendant prior to the trial, Kratch told him that Swarts who was in possession of plaintiff's store, was a salesman and that Burch was the renting agent of the defendant.

The only evidence offered by the defendant is that of the auditor of the company, who testified that no checks were issued, and that no check payable to the plaintiff was returned.

Counsel for defendant complains that incompetent evidence was admitted on behalf of the plaintiff to the effect that a statement was made by Burch, in negotiating for a lease of the plaintiff's store, that he was the renting agent of the defendant, which statement could not bind the defendant. However, the admission of Kratch that Burch was the renting agent and that Swarts was a salesman of the defendant cures the objection of counsel and makes this evidence clearly competent.

Criticism of the action of the trial court is made by the defendant because of its denying an application by the defendant for a further continuance. The defendant claims that it was taken by surprise by the evidence offered on behalf of plaintiff at the continued hearing.

It appears from the record that the defendant's affidavit of merits raises an issue of the authority of Burch to rent the premises for and on behalf of the defendant, and that the defendant

The trial was commenced and continued after the close of the plaintiff's case, on motion of the defendant's attorney, to January 27, 1931, and on that date the case was called for further hearing. The plaintiff was again called to the stand, over the objection of the defendant, and testified, in substance, that the officer to whom he talked and whose name he could not give at a previous hearing, was the president of the company, and that his name is Charles Smith.

The plaintiff further testified that when he went to the office of the defendant prior to the trial, Irwin told him that people who was in possession of plaintiff's story, was a salesman and that Burch was the renting agent of the defendant.

The only evidence offered by the defendant is that of the auditor of the company, who testified that no checks were issued, and that no check payable to the plaintiff was returned.

Counsel for defendant complains that incompetent evidence was admitted on behalf of the plaintiff to the effect that a statement was made by Burch, in negotiating for a lease of the plaintiff's store, that he was the renting agent of the defendant, which statement could not bind the defendant. Moreover, the admission of Kretch that Burch was the renting agent and that Smith was a salesman of the defendant supra the objection of counsel and makes this evidence clearly competent.

Criticism of the action of the trial court is made by the defendant because of its ruling as evidencing by the defendant for a further continuance. The defendant claims that it was taken by surprise by the evidence offered on behalf of plaintiff at the continued hearing.

It appears from the record that the defendant's affidavit of merits raises an issue of the authority of Burch to rent the premises for and on behalf of the defendant, and that the defendant

did not confirm or approve the lease. When the plaintiff testified in his own behalf at the first hearing, he stated that he called at defendant's place of business before the trial and talked to an official of the company, but upon objection by the defendant its objection was sustained, on the ground that the plaintiff could not identify the person by name. He further testified at the continued hearing that he subsequently visited the same place of business and identified Kratch, who is the admitted president of the defendant company.

It is to be noted that the defendant asked and the court granted a continuance after the plaintiff offered evidence, and under the facts, the trial court cannot be charged with abuse of discretion in refusing to further continue this case. The issues were plain and it was the duty of the defendant to be prepared and offer its defense if it wished to do so.

We have noted the defendant's contention that the trial court was prejudiced and biased against the defendant, and that it is relying upon the statement of the court at the first hearing that "according to this evidence the plaintiff is clearly entitled to a judgment." The court was justified in finding for the plaintiff upon this record. The court in finding for the plaintiff passed upon the credibility of the witnesses and the weight of the evidence, and such finding is not against the manifest weight of the evidence. The rule is that in passing upon questions of fact where there is evidence from which the trial court could find for the plaintiff, it will not be disturbed, although the evidence may, in the opinion of the Appellate Court, justify a different conclusion. T. H. & B. Ry.Co.v. Moore, Adam. 77 Ill. 217.

The defendant under the facts is liable for the leasing of the premises and its occupancy, and for the amount due, and the court so found. We have examined the record and are satisfied that there is no reversible error.

Therefore, the judgment in this cause is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

did not question or discuss the issue. When the plaintiff testified in his own behalf at the first hearing, he stated that he called at defendant's place of business before the trial and talked to an official of the company, but upon objection by the defendant its objection was sustained, on the ground that the plaintiff could not identify the person by name. He further testified at the continued hearing that he subsequently visited the same place of business and identified Green, who is the admitted president of the defendant company.

It is to be noted that the defendant rested and the court granted a continuance after the plaintiff offered evidence, and under the facts, the trial court cannot be charged with abuse of discretion in refusing to further continue this case. The issues were plain and it was the duty of the defendant to be prepared and offer the defense if it wished to do so.

We have noted the defendant's contention that the trial court was prejudiced and biased against the defendant, but when it is relying upon the statement of the court at the first hearing that "according to this evidence the plaintiff is clearly entitled to a judgment." The court was justified in finding for the plaintiff upon this record. The court in finding for the plaintiff passed upon the credibility of the witnesses and the weight of the evidence, and such finding is not against manifest weight of the evidence. The rule is that in passing upon questions of fact where there is evidence from which the trial court could find for the plaintiff, it will not be disturbed, although the evidence may, in the opinion of the appellate court, justify a different conclusion. I. C. R. R. Co. v. Smith, 177 Ill. 217.

The defendant under the facts is liable for the issuing of the premiums and its property, and for the amount due, and the court so found. We have examined the record and are satisfied that there is no reversible error.

Therefore, the judgment in this cause is affirmed.

34488

MYRTLE F. SIMON,

Defendant in Error,

v.

EDWARD SINGER, EDWARD L. GROSS and ISIDORE SIMON,

Defendants.

EDWARD SINGER,

Plaintiff in Error.

WRIT OF ERROR

TO SUPERIOR COURT

COOK COUNTY.

261 I.A. 648

Opinion filed April 15, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

The plaintiff in error, Edward Singer, defendant below, brings the record in this case before this court on a writ of error.

The plaintiff brought suit in assumpsit in the Superior Court against the defendants, Edward Singer, Edward L. Gross and Isidore Simon, for commission alleged to have been earned by her as a broker in procuring purchasers for certain real estate located in Chicago, Illinois, and offered for sale by the defendants. The plaintiff's claim was for $11,000.

One of the defendants, Edward Singer, was served, and filed his plea of the general issue and an affidavit of merits, denying that he authorized the plaintiff to act as broker for him in procuring a purchaser for the real estate, and reciting that the defendant never promised to pay to the plaintiff any commission on the sale.

When the case was reached for trial, two defendants, Isidore Simon and Edward L. Gross, who had not been served by the sheriff, entered their written appearances, and consent to the entry of a judgment, which was objected to by the defendant Singer.

The plaintiff testified that she had a conversation with the three defendants in 1926, in regard to a buyer for the property involved; that she talked to Simon and Gross first and to Singer

Opinion filed April 15, 1921

Mr. JUSTICE HUNT delivered the opinion of the court.

The plaintiff in error, Edward Singer, defendant below, brings the record in this case before this court on a writ of error.

The plaintiff sought suit in ejectment in the superior court against the defendants, Edward Singer, Edward L. Green and Pedro Alonso, for possession alleged to have been seized by her as a trustee in proceeding mortgagors for certain real estate located in Chicago, Illinois, and offered for sale by the defendants. The plaintiff's claim was for $14,000.

One of the defendants, Edward Singer, was served, and filed his plea of the general issue and an affidavit of merits, denying that he authorized the plaintiff to act as broker for him in procuring a purchaser for the real estate, and recalling that the defendant never promised to pay to the plaintiff any commission on the sale.

When the case was reached for trial, the defendants, Pedro Alonso and Edward L. Green, who had not been served by the sheriff, entered their written appearances, and consent to the entry of a judgment, which was objected to by the defendant Singer.

The plaintiff testified that she had a conversation with the Green defendants in 1920, in regard to a loan for the property involved; that she talked to Edward Green first and to Singer

later; that she told the defendant, Singer, the details of a deal she could make; that he thought the sale was a good one and told her to go ahead; that she procured the signing of a contract to purchase on December 28, 1926, embodying the terms discussed with Singer; that three or four days after the contract was signed, she told Singer the contract had been signed, and he said that he was glad; that after the signing of the contract plaintiff attended to the details of the surveying, the platting of the property, and in procuring the vacation of streets and alleys; and attended to the closing of the deal on October 26, 1927; that just before the deal was closed, the defendant insisted on taking part in the same, but the plaintiff stated that as long as she was being paid to take care of it she would be able to close it alone.

The plaintiff further testified that she had no interest in the property, did not have any money invested in the same, and that the property had been purchased by Mr. Simon, one of the defendants, in 1925; that Gross and Singer, the other defendants, became interested in the property at the same time; that these three owned it during 1926, and thereafter; that at the time the details of the proposed sale were being discussed with Singer, the question of a commission was not mentioned.

It appears from plaintiff's evidence that she was a licensed real estate broker, and that she acted as the broker in this deal; that after the deal was closed, the defendant Singer said that he would not pay any commission.

Defendant's testimony is to the effect that he did not have any conversation with the plaintiff in regard to her acting as broker for the sale of the defendant's interest, but admitted that after the contract was signed he asked to be kept informed as to the deal and acquiesced to certain costs entailed in the deal.

later; that she told the defendant, Singer, the details of a deal she could make; that he thought the sale was a good one and told her to go ahead; that she procured the signing of a contract to purchase on December 28, 1928, accompanying the terms discussed with Singer; that three or four days after the contract was signed, she told Singer the contract had been signed, and he said that he was glad; that after the signing of the contract plaintiff attended to the details of the surveying, the platting of the property, and in procuring the vacation of streets and alleys; and attended to the closing of the deal on October 28, 1929; that just before the deal was closed, the defendant insisted on taking part in the deal, but the plaintiff stated that as long as she was doing all to take care of it she would be able to close it alone.

The plaintiff further testified that she had no interest in the property, did not have any money invested in the deal, and that the property had been purchased by Mr. Klein, one of the defendants, in 1928; that Kroon and Singer, the other defendants, became interested in the property at the same time; that these owned it during 1929, and understood that at the time the details of the proposed sale were being discussed with Singer, the question of a commission was not mentioned.

It appears from plaintiff's evidence that she was a licensed real estate broker, and that she acted as the broker in this deal; that after the deal was closed, the defendant Singer said that he would not pay any commission.

Defendant's testimony is to the effect that he did not have any conversation with the plaintiff in regard to her acting as broker for the sale of the defendant's interest, but admitted that after the contract was signed he asked to be kept informed as to the deal and consented to certain costs entailed in the deal.

The defendant offered as his exhibit, a trust agreement dated December 1, 1925, setting forth that the trustee, the Woodlawn Trust & Savings Bank took title to certain property, including the property involved in the instant suit, for the use and benefit of Edward L. Gross, Edward Singer and Isidore Simon.

The defendant further testified that he had no objection to the sale price, and that he had received his share out of the transaction.

At the close of plaintiff's evidence, Edward Singer moved the court to direct the jury to find for the defendant Singer, which motion was denied. Thereupon he offered evidence in his behalf, and then at the close of all the evidence made a motion to the same effect, which motion was overruled. The jury returned a verdict against the defendants Isidore Simon, Edward L. Gross and Singer for the sum of $5,500. Motions by the defendant Singer for a new trial and in arrest of judgment were made and overruled, and a judgment was entered for the amount of the verdict.

Defendant Singer urges: (1) that the court should not have permitted the appearance and consent of the defendants Simon and Gross to a judgment to be filed; and (2) that as the action is a joint one against three defendants, a judgment cannot be entered unless the plaintiff proves a joint liability, and as no joint liability was established the judgment should be reversed.

We will take up the points in the order complained of by the defendant.

As to the first point, when the court allowed the two defendants Simon and Gross to enter their respective written appearances and consent to the judgment, which were presented before the commencement of the trial and filed in apt time, the court did what these parties defendant to the suit desired, which was proper.

The defendant offered as his exhibit, a trust agreement dated December 1, 1920, setting forth that the trustee, the Montana Trust & Savings Bank took title to certain property, including the property involved in the instant suit, for the use and benefit of Edward L. Stone, Edward Singer and Isidore Simon.

The defendant further testified that he had no objection to the sale price, and that he had received his share out of the transaction.

At the close of plaintiff's evidence, Edward Singer moved the court to direct the jury to find for the defendant Singer, which motion was denied. Thereupon he offered evidence in his behalf, and then at the close of all the evidence made a motion to the same effect, which motion was overruled. The jury returned a verdict against the defendants Isidore Simon, Edward L. Stone and Singer for the sum of $3,000. Motions by the individual Singer for a new trial and in arrest of judgment were made and overruled, and a judgment was entered for the amount of the verdict.

Defendant Singer urges: (1) that the court should not have permitted the examination and consent of the defendants Simon and Stone to judgment to be filed; and (2) that as the action is a joint one against three defendants, a judgment cannot be entered unless the plaintiff proves a joint liability, and as no joint liability was established the judgment should be reversed.

We will take up the points in the order mentioned of by the defendant.

As to the first point, when the court allowed the two defendants Simon and Stone to enter their respective written appearances and consent to the judgment, which were presented before the commencement of the trial and filed in apt time, the court did what these certain defendant to the suit desired, which was proper.

The defendant Singer was not bound by the consent of the other defendants to a judgment, and it was necessary to submit the evidence to a jury to decide the issues between the parties. No complaint is made that the jury was prejudiced, or that they returned a verdict against the defendants with knowledge that two of them had consented to a judgment.

As to the second point, the plaintiff's answer is to the effect that the question of joint liability cannot be raised at this time, for it was not preserved for review by reason of the failure of the defendant Singer to present written instructions to the court directing the jury to find for the defendant at the time the defendant's motion for a directed verdict was made at the close of all the evidence, and denied; and that the question as to whether the evidence did or did not tend to prove joint liability is not before this court; nor does it appear from the bill of exceptions that the defendant preserved any exceptions to the action of the court in overruling his motion for a directed verdict at the close of the evidence, or to the overruling of the motion for a new trial and in arrest of judgment.

Before discussing these questions from the standpoint of the record, it will be well to have in mind the rules announced by the Supreme Court that apply and are controlling in disposing of these questions.

In the case of Variety Manf. Co. v. Landaker, 227 Ill. 22, the court adopted and applied the rule, that failure to present with the defendant's motion for a directed verdict an instruction in writing directing the jury to find for the defendant did not, as a matter of law, preserve the question of the sufficiency of the evidence to sustain the verdict. To the same effect are the cases of Mayville v. French, 246 Ill. 434, and Reiter v. Standard Scale Co., 237 Ill. 374.

The defendants finger was not bound by the consent of the other defendants to a judgment, and it was necessary to submit the evidence to a jury to decide the issues between the parties. No complaint is made that the jury was prejudiced, or that they returned a verdict against the defendants with knowledge that two of them had consented to a judgment.

As to the second point, the plaintiff's answer is to the effect that the question of joint liability cannot be raised at this time, for it was not preserved for review by reason of the failure of the defendants finger to present written instructions to the court directing the jury to find for the defendant at the time the defendant's motion for a directed verdict was made at the close of all the evidence, and denied; and that the question as to whether the evidence did or did not tend to prove joint liability is not before this court; nor does it appear from the bill of exceptions that the defendant preserved any exceptions to the action of the court in overruling his motion for a directed verdict at the close of the evidence, or to the overruling of the motion for a new trial and in arrest of judgment.

Before discussing these questions from the standpoint of the record, it will be well to have in mind the rules announced by the Supreme Court that apply and are controlling in disposing of these questions.

In the case of Kansas Mod. Co. v. Lundquist, 327 Ill. 27, the court adhered and applied the rule, that failure to present with the defendant's motion for a directed verdict an instruction in writing directing the jury to find for the defendant did not, as a matter of law, preserve the question of the sufficiency of the evidence to sustain the verdict. To the same effect see the cases of McKillip v. Jewell, 206 Ill. 474, and Yates v. Chicago Union Ry. 237 Ill. 374.

Again, the Supreme Court announced and applied a rule in the case of People v. Gabrys, 329 Ill. 101, which is to the same effect, in these words:

> "To permit a review of an order denying a motion for a new trial the bill of exceptions must show that such a motion was made and the order of the court denying the same. The only method by which these questions can be preserved is by a bill of exceptions. (Call v. People, 201 Ill. 499; Harris v. People, 130 id. 457.) In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict it is necessary that the losing party make a motion for a new trial, and upon its being overruled except to such ruling, and to include such motion, the order overruling the same and exceptions thereto, together with the evidence, in a bill of exceptions. (Yarber v. Chicago and Alton Railway Co. 235 Ill. 589.)"

A further rule is, the fact that the Clerk in writing up the record recited therein the making of these motions and the saving of exceptions, will not preserve the same for review. McDonald v. The People, 222 Ill. 325; People v. Faulkner, 348 Ill. 158; West v. Franklin Fire Ins. Co. 245 Ill. App. 174.

The record before us contains a bill of exceptions, and by referring to the abstract we find the following:

> "Mr. Mills: Now comes the defendant, Edward Singer, at the close of all the evidence, and renews his motion for an instruction to the jury to find for the defendant at the close of the plaintiff's evidence and also moves for an instruction by the Court to the jury to find for the defendant at the close of all the evidence.
> The Court: Motion denied; we will have more time on a motion for new trial and this can be presented to the Court."

and again:

> "And thereupon the defendant, Edward Singer, by his counsel, entered his motion to set aside the verdict and to grant a new trial, which motion was denied by the Court.
> And thereupon the defendant, Edward Singer, by his counsel, made a motion in arrest of judgment, which motion was overruled and denied by the Court.
> And the Court thereupon entered judgment upon the verdict."

It is apparent from the bill of exceptions that the defendant, Singer, did not at the time the motion was made at the close of all the evidence, present a written instruction to the court

Again, the Supreme Court announced and applied a

rule in the case of Irvine v. Gunter, 90 Ill. 121, which is in the

same effect, in these words:

> "In permit a review of an action charging a motion for a new trial the bill of exceptions must show that such a motion was made and the entry of the court denying the same. The only method by which these questions can be presented is by a bill of exceptions. (Dell v. Ingham, 121 Ill. 609; Morris v. Irvine, 121 Ill. 627.) In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict it is necessary that the losing party make a motion for a new trial, and upon the motion preserved errors in such ruling, and in similar such motion, the order overruling the same and exceptions thereto, together with the evidence, is a bill of exceptions. (Fisher v. Chicago and Alton Railway Co. 131 Ill. 283.)"

A further rule is, the fact that the Clerk in entering

on the record twelve days the ruling of these motions and the

entry of exceptions, will not preserve the same for review.

Kenneth v. The People, 200 Ill. 328; Fenwick v. Kelleher, 202 Ill. 188;

Ford v. Dowling Pipe Ins. Co. 202 Ill. 4p. 164.

The record before us contains a bill of exceptions, and

by referring to the abstract we find the following:

> "Mr. Elder: Now comes the defendant, Edward Singer, at the close of all the evidence, and renews his motion for an instruction to the jury to find for the defendant at the close of the plaintiff's evidence and also moves for an instruction by the Court to the jury to find for the defendant at the close of all the evidence.
>
> The Court: Motion denied; we will have more time on a motion for new trial and this can be presented to the Court."

and again:

> "And thereupon the defendant, Edward Singer, by his counsel, entered his motion to set aside the verdict and to grant a new trial, which motion was denied by the Court.
>
> And therefore the defendant, Edward Singer, by his counsel, made a motion in arrest of judgment, which motion was overruled and denied by the Court.
>
> And the Court thereupon entered judgment upon the verdict."

It is apparent from the bill of exceptions that the

defendant, Singer, did not at the time the motion was made at the

close of all the evidence, present a written instruction to the court

to instmuct the jury to find for the defendant; nor did the defendant, when the motions by him for a new trial and in arrest of judgment were made and denied, preserve any exceptions to such rulings of the court. It is to be noted from the record that instructions offered by the parties and marked given and refused are not incorporated therein. However, it appears from the abstract that instructions were read by the court to the jury. It further appears that the defendant not only failed to present a written instruction in support of his motion to find for the defendant, but also that he failed to except to the ruling of the court denying defendant's motions; and to except to the ruling of the court denying a new trial and the motion in arrest of judgment.

For the reasons stated, this defendant has failed to save for review the question of the sufficiency of the evidence to sustain the verdict.

Such a conclusion, of necessity, follows from the application of the law controlling the action of this court. It may be, however, that instructions given by the court to the jury have cured the errors complained of, and we may infer that the jury was correctly instructed by the court upon the law applicable to the facts.

Finding no error in the record, the judgment is accordingly affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

to instruct the jury to find for the defendant; nor did the defendant, when the motions by him for a new trial and in arrest of judgment were made and denied, preserve any exception to such ruling of the court. It is to be noted from the record that instructions offered by the parties and method given and refused are not incorporated therein. However, it appears from the abstract that instructions were read by the court to the jury. It further appears that the defendant not only failed to present a written instruction in support of his motion to find for the defendant, but also that he failed to except to the ruling of the court denying defendant's motions; and to except to the ruling of the court denying a new trial and the motion in arrest of judgment.

For the reasons stated, this defendant has failed to save for review the question of the sufficiency of the evidence to support the verdict.

Such a conclusion, of necessity, follows from the application of the law controlling the action of this court. It may be, however, that instructions given by the court to the jury have raised the errors complained of, and we may infer that the jury was correctly instructed by the court upon the law applicable to the facts.

Finding no error in the record, the judgment is accordingly affirmed.

AFFIRMED.

HIXON, C.J., AND DILLON, J., CONCUR.

34632

SARGENT & COMPANY, a Corp.,
Appellant,

v.

MARYLAND BUILDING CORPORATION, et al.,
Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

261 I.A. 648

Opinion filed April 15, 1931

MR. JUSTICE MILL delivered the opinion of the court.

This is an appeal by the complainant from a decree confirming the Report of a Master in Chancery and dismissing for want of equity a Bill to Foreclose a Mechanic's Lien upon the building and the land of the Maryland Building Corporation, one of the defendants, and to recover $1512.14, of which $1500.00 was a contract indebtedness, and $12.14 was for extras claimed to be due from the defendants to the complainant.

The bill of complaint charges that the complainant entered into a written contract with one Louis Lipavski, doing business as the Englewood Hardware Company, to furnish finished hardware to be used in the building of the Maryland Building Corporation.

The undisputed evidence of the complainant is, in substance, that on December 8, 1927 it entered into a written contract with Louis Lipavski, doing business as the Englewood Hardware Company to furnish finished hardware to be used in the building of the Maryland Building Corporation; that said Louis Lipavski was the owner of the Englewood Hardware Company, and that he in turn had a contract with the Maryland Building Corporation to furnish said hardware for the sum of $1750, and that the hardware was delivered by the complainant under its contract and used in the building of the Maryland Building Corporation; that the contract price of the complainant was $1500; that deliveries of the hardware were made

Opinion filed April 15, 1921

MR. JUSTICE KEHOE delivered the opinion of the court.

This is an appeal by the complainants from a decree confirming the report of a master in chancery and dismissing for want of equity a bill to foreclose a mechanic's lien upon the building and the land of the Maryland Building Corporation, one of the defendants, and to recover $1212.14, of which $1200.00 was a contract indebtedness, and $12.14 was for extras claimed to be due from the defendants to the complainant.

The bill of complaint charges that the complainant entered into a written contract with one Louis Lipsveki, doing business as the Englewood Hardware Company, to furnish finished hardware to be used in the building of the Maryland Building Corporation; that said Louis Lipsveki was the owner of the Englewood Hardware Company, and that he in turn had a contract with the Maryland Building Corporation to furnish said hardware for the sum of $1200, and that the hardware was delivered by the complainant under its contract and used in the building of the Maryland Building Corporation; that the contract price of the complainant was $1200; that extras of the hardware were made

between March 8 and 13, 1928, and that extra materials for the building were furnished by the complainant on May 18, 1928.

It is contended by the complainant that under Section 24, Chapter 82 of the Mechanic's Lien Act, a notice of claim of lien in the form of a letter was served by mail on Schiff Trust & Savings Bank, a corporation, by the complainant, which letter was dated February 24, 1928; that receipt of that notice in the form of a letter was acknowledged in writing on February 25, 1928, in a letter to the complainant written by the Schiff Trust & Savings Bank, a corporation, and that this was a substantial compliance with the requirements of Section 24 requiring a 60 day sub-contractor notice of lien.

The record disclosed that the Schiff Trust & Savings Bank held title to the premises as trustee under the terms of a trust deed in the nature of a mortgage from the Maryland Building Corporation.

With reference to the letter of complainant to the Schiff Trust & Savings Bank, it appears that the complainant was inquiring as to the credit standing of Sam Lipavski, who wished to guarantee the account of his son Louis Lipavski, doing business as the Englewood Hardware Company, and with whom the complainant had the hardware contract.

The complainant's contract with the Englewood Hardware Company makes it a sub-contractor, and it is not entitled to enforce a lien unless it complies with Section 24, Chapter 82 of the Mechanic's Lien Law, which section provides, in substance, that a sub-contractor must personally serve a written notice on the owner within 60 days after the completion of its contract, except that the notice shall be filed in the office of the Registrar where the land is registered under the provisions of an Act concerning land titles, unless such notice is obviated by a sworn statement of the contractor to the owner, wherein the name of such sub-contractor and the amount due appears.

between March 8 and 12, 1928, and that extra materials for the building were furnished by the complainant on May 12, 1928.

It is contended by the complainant that under Section 24, Chapter 83 of the Mechanic's Lien Act, a notice of claim of lien in the form of a letter was served by mail on Dodit Trust & Savings Bank, a corporation, by the complainant, which letter was dated February 24, 1928; that receipt of that notice in the form of a letter was acknowledged in writing on February 28, 1928, in a letter to the complainant signed by the Dodit Trust & Savings Bank, a corporation, and that this was a substantial compliance with the requirements of filing the notice of a sub-contractor notice of lien.

The answer claimed that the Dodit Trust & Savings Bank had title to the premises in trustee under the terms of a trust deed in the nature of a mortgage from the Midland Building Corporation.

With reference to the letter of complainant to the Dodit Trust & Savings Bank, it appears that the complainant was inquiring as to the credit standing of Sam Lipsky, who wished to guarantee the account of his son Louis Lipsky, doing business as the Ingleweed Furniture Company, and with whom the complainant had the hardware contract.

The complainant's contract with the Ingleweed Furniture Company makes it a sub-contractor, and it is not entitled to enforce a lien unless it complies with Section 24, Chapter 83 of the Mechanic's Lien Law, which section provides, in substance, that a sub-contractor must personally serve a written notice on the owner within 60 days after the completion of the contract, except that the notice shall be filed in the office of the Registrar where the land is registered under the provisions of an act concerning land titles, unless such notice is obviated by a sworn statement of the contractor to the owner, wherein the name of such sub-contractor and the amount due appears.

The facts in evidence disclose that the complainant's name does not appear in the verified statement furnished the owner by the contractor. The statement is on a printed form, under the printed heading, "Finished Hardware." No name or amount appears. The complainant's name not appearing in the contractor's statement, the owner is not liable under Section 5 of the Mechanic's Lien Law, which is, in part, as follows:

> "It shall be the duty of the contractor to give the owner, and the duty of the owner to require of the contractor, before the owner, or his agent, architect or superintendent, shall pay or cause to be paid " " " a statement in writing, under oath or verified by affidavit, of the names of all parties furnishing materials and labor, and of the amounts due or to become due each."

It is clear that the complainant did not within 60 days after the completion of its contract cause a written notice of its claim and the amount due, to be personally served on the owner, its agent, architect or superintendent in charge of the building, and in this case, because of such failure, the complainant is not entitled to enforce its lien for the amount of its contract.

We cannot construe complainant's letter addressed to the Schiff Trust & Savings Bank to be such a notice as is required under Section 24 of the Act; and again, it was not personally served upon the owner in the manner required by the law. The manner of service has been passed upon in the case of Agles v. Stolze Lumber Co. 260 Ill. App. 14, where the court says:

> "The requirement of section 24 providing for service of personal notice of the character therein described upon the owner, or his agent, or architect, or superintendent in charge of work within 60 days from the completion of his work, are plain and must be complied with in order to give the sub-contractor a mechanic's lien. Throgmorton v. Mosak, 245 Ill. App. 330."

Failure of the complainant to personally serve notice on the owner within 60 days after the last delivery of the finished

The facts in evidence disclose that the complainant's name does not appear in the verified statement furnished the owner by the contractor. The statement is on a printed form, under the printed heading, "FINAL STATEMENT." At some or another appears the complainant's name not appearing in the contractor's statement, the owner is not liable under Section 5 of the Mechanic's Lien Law, which is, in part, as follows:

> "It shall be the duty of the contractor to give the owner, and the duty of the owner to require of the claimant, before the owner, or the agent, architect or superintendent, shall pay or cause to be paid " " " a statement in writing, under oath or verified by affidavit, of the names of all persons furnishing materials and labor, and of the amounts due or to become due each."

It is clear that the complainant did not within 30 days after the completion of its contract cause a written notice of its claim and the amount due, to be personally served on the owner, its agent, architect or superintendent in charge of the building, and in this case, because of such failure, the complainant is not entitled to enforce its lien for the amount of its contract.

We summary concludes complainant's letter addressed to the Habit Trust & Savings Bank to be such a notice as is required under Section 25 of the Act; and again, it was not personally served upon the owner in the manner required by the law. The manner of service has been treated upon in the case of Adler v. Storing Lumber Co. 200 Ill. App. 14, where the court says:

> "The requirement of section 25 providing for service of personal notice of the character therein described upon the owner, or his agent, or architect, or superintendent in charge of such building 30 days from the completion of his work, are plain and must be complied with in order to give the sub-contractor a mechanic's lien. Ferguson v. Dunn, 245 Ill. App. 200."

Failure of the complainant to personally serve notice on the owner within 30 days after the last delivery of the finished

hardware, deprived it of the right as a sub-contractor to a lien. The fact that the owner had knowledge of its contract and the use of its hardware, does not make the complainant an original contractor.

The Mechanic's Lien Law is to be strictly complied with, and the complainant in failing to comply with its provisions, is not within its terms, and, therefore, cannot enforce the lien contended for in this proceeding.

The decree of the Chancellor is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

[illegible] [illegible] of the right as a sub-contractor to a line. The fact that the money was expended by the contractor and the use of its machinery, does not make the municipality an original contractor.

The Legislature alone has the right to be a private municipal city, and the municipality is filling a capacity -for the purposes, is not within its terms, and, therefore, cannot endorse the line contracted for in this proceeding.

The course of the Commissioner is affirmed.

ATTORNEY.

[illegible] [illegible] [illegible] [illegible] [illegible].

34644

CHARLES E. GRAHAM, Appellant, v. H. M. CAMMACK, Appellee.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

261 I.A. 649

Opinion filed April 15, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This is an appeal from a judgment entered in the Circuit Court of Cook County for the defendant and against the plaintiff for want of prosecution in a suit in assumpsit brought by Charels E. Graham, plaintiff, against H. M. Cammack, defendant.

On October 17, 1928, the plaintiff filed his declaration, consisting of four counts, together with a copy of the instrument sued on, and an affidavit of claim. On November 19, 1928, the defendant filed a plea of the general issue to all the counts of the declaration and an affidavit of merits.

On July 2, 1930, plaintiff moved to strike the affidavit of merits and for a judgment as in case of default, which motion was denied. Thereupon the case was reached for trial and the plaintiff persisted in his motion to strike the affidavit of merits and for judgment as in case of default and elected to stand upon said motion and refused to proceed further with the trial of the cause. Thereupon the Court entered judgment for the defendant and against the plaintiff for want of prosecution, from which judgment this appeal is prosecuted.

The first count of the declaration alleges that plaintiff and defendant entered into a written contract on March 3, 1926, which contract is set out in haec verba; that plaintiff thereupon undertook and was diligently engaged in the performance of the

Opinion filed April 15, 1931

MR. JUSTICE BERRY delivered the opinion of the court.

This is an appeal from a judgment entered in the Circuit Court of Cook County for the defendant and against the plaintiff for want of prosecution in a suit in assumpsit brought by Theresia E. Jordan, plaintiff, against E. L. Dawson, defendant.

On October 17, 1928, the plaintiff filed his declaration, consisting of four counts, together with a copy of the instrument sued on, and an affidavit of claim. On November 13, 1928, the defendant filed a plea of the general issue to all the counts of the declaration and an affidavit of merits.

On July 8, 1929, plaintiff moved to strike the affidavit of merits and for a judgment as in case of default, which motion was denied. Thereupon the case was remoded for trial and the plaintiff persisted in his motion to strike the affidavit of merits and for judgment as in case of default and elected to stand upon said motion and refused to proceed further with the trial of the cause. Thereupon the court entered judgment for the defendant and against the plaintiff for want of prosecution, from which judgment this appeal is prosecuted.

The first count of the declaration alleges that plaintiff and defendant entered into a written contract on March 3, 1928, which contract is set out in haec verba; that plaintiff thereupon undertook and was diligently engaged in the performance of the

contract on his part, and expended the sum of $5,000 in such performance, and the defendant, on March 18, 1926, notified the plaintiff that he withdrew, revoked and canceled the contract.

The second count alleges that the plaintiff and the defendant entered into a certain contract in writing at Chicago, Illinois, on March 3, 1926, which contract is set out in haec verba; that the plaintiff was the duly constituted and acting administrator of the estate of Frank W. Graham, deceased, and the duly constituted and acting guardian of Emeretta Kipp Graham, a person of unsound mind; that forthwith upon the execution of said contract plaintiff undertook and was diligently engaged in furnishing and delivering to the defendant and his counsel all documents, etc; that on March 18, 1926, the defendant addressed a letter to the plaintiff, withdrawing, revoking and cancelling said contract on the alleged ground that the plaintiff was not lawfully authorized or empowered as administrator of the estate of Frank W. Graham, deceased, to sell or contract for the sale of personal property of said decedent.

The third count alleges that the defendant on March 18, 1926, became indebted to the plaintiff in the sum of $5,000 on account of liquidated damages because of defendant's repudiation of a certain written contract dated March 3, 1926 .

The fourth count was a consolidated common count.

A copy of the written contract sued on was attached to the declaration.

The defendant's affidavit of merits recites that the plaintiff in his capacity as administrator of the estate of Frank W. Graham, deceased was never authorized or empowered by the court to execute the agreement dated March 3, 1926, and set forth in the plaintiff's claim,or to sell the personal property of said Frank W. Graham, deceased, upon the terms and conditions set forth; that the laws of the State of Missouri, within which state such appointment

contract on his part, and expended the sum of $8,000 in such performance, and the defendant, on March 18, 1938, notified the plaintiff that he rescind and cancel the contract.

The second count alleges that the plaintiff and the defendant entered into a certain contract in writing at Chicago, Illinois, on March 3, 1938, which contract is set forth in full in the second count; that the plaintiff was the duly constituted and acting administrator of the estate of Frank N. Graham, deceased, and the duly constituted and acting guardian of Beverly Jay Graham, a person of unsound mind; that further upon the execution of said contract plaintiff performed and was diligently engaged in furnishing and delivering to the defendant and his nominee all documents, and; that on March 18, 1938, the defendant addressed a letter to the plaintiff, withdrawing, revoking and cancelling said contract on the alleged ground that the plaintiff was not legally authorized or empowered as administrator of the estate of Frank N. Graham, deceased, to sell or contract for the sale of personal property of said decedent.

The third count alleges that the defendant on March 18, 1938, became indebted to the plaintiff in the sum of $8,000 on account of liquidated damages because of defendant's repudiation of a certain written contract dated March 3, 1938.

The fourth count was a consolidated common count.

A copy of the written contract sued on was attached to the declaration.

The defendant's affidavit of merits recites that the plaintiff in his capacity as administrator of the estate of Frank N. Graham, deceased was never authorized or empowered by the court to execute the agreement dated March 3, 1938, and set forth in the plaintiff's claim, or to sell the personal property of said Frank N. Graham, deceased, upon the terms and conditions set forth; that the laws of the State of Missouri, within which state such administrator

was made, expressly disabled an administrator from selling or contracting to sell personal property of his intestate except in accordance with the specific orders of the Court having jurisdiction over the administration of such estate; that the plaintiff in his capacity as administrator was in no manner bound by said agreement; that such agreement accordingly lacked mutuality, and that the plaintiff was at all times wholly unable to deliver goods, merchantable or reasonably satisfactory title to any of the real estate mentioned or described as belonging to Frank W. Graham, deceased.

The plaintiff asserts that the defendant's affidavit of merits does not state facts constituting a good defense to the cause of action set forth in the plaintiff's declaration and affidavit of claim.

The defendant contends that the dismissal of the plaintiff's case for want of prosecution was proper, and irrespective of any ruling on an interlocutory motion, the order appealed from should be affirmed; and if affirmed, the plaintiff is free to sue again if he chooses.

The question as to whether the order for a dismissal for want of prosecution was a final judgment will be determined from the order entered in this case, which is as follows:

> "This cause coming on to be heard this day upon the motion of plaintiff, Charles E. Graham, by Markheim and Allie, his attorneys, to strike the affidavit of merits heretofore filed herein by the defendant, H. M. Gammack, and for judgment as in case of default by virtue of the statute in such case made and provided for the sum of Five Thousand Dollars ($5,000), together with interest at the lawful rate from March 18, 1926;
>
> Thereupon It Is Ordered that said motion of plaintiff is denied, to which order plaintiff excepts.
>
> Whereupon, this cause coming on further to be heard for trial, and plaintiff standing upon his motion to strike said affidavit of merits, and refusing to proceed further with the trial of the cause;
>
> It Is Further Ordered that judgment be entered for the defendant and against the plaintiff for want of prosecution, at plaintiff's costs, to which judgment plaintiff excepts

was made, expressly directing an administrator from selling or encumbering to real property of his intestate except in accordance with the specific orders of the court having jurisdiction over the administration of such estate; that the plaintiff as the adjudged administrator was in no manner bound by said agreement; that such agreement accordingly lacked authority, and that the plaintiff was at all times equally unable to deliver possession or performance of the real estate mentioned or described as belonging to them. Demurrer, overruled.

The plaintiff asserts that the defendant's affidavit of merits does not state facts constituting a good defense in the cause of action set forth in the plaintiff's declaration and affidavit of claim.

The defendant contends that the dismissal of the plaintiff's suit for want of prosecution was proper, and irrespective of any ruling on an interlocutory motion, the order appealed from should be affirmed; and if affirmed, the plaintiff is free to sue again if he chooses.

The question as to whether the order for a dismissal for want of prosecution was a final judgment will be determined from the order entered in this case, which is as follows:

> 'This cause coming on to be heard this day upon the motion of plaintiff, Thelma E. Cooper, by Stephens and Allie, his attorneys, to strike the affidavit of merits heretofore filed herein by the defendant, K. H. Dunmore, and for judgment as in case of default by virtue of the statute in such case made and provided for the sum of Five Thousand Dollars ($5,000), together with interest at the legal rate from March 15, 1930;
>
> Thereupon it is ordered that said motion of plaintiff is denied, as being entirely meaningless.
>
> Thereupon, this cause coming on further to be heard for trial, and plaintiff renewing her motion to strike said affidavit of merits, and returning to proceed further with the trial of the cause;
>
> It is further ordered that judgment be entered for the defendant and against the plaintiff for want of prosecution, at plaintiff's costs, to which judgment plaintiff excepts

and prays an appeal, which appeal is hereby allowed upon plaintiff's filing an appeal bond in the sum of $250.00 within sixty days and bill of exceptions within sixty days."

The contention is also made that the order is interlocutory and not final, but such contention is not supported by citation of authorities. The court, however, upon an examination of adjudicated cases, finds that the Supreme and Appellate Courts, in cases analogous to the instant case, announce certain rules which are guides in the determination of this question and which are to the effect that the order must terminate and finally and completely dispose of the action. And if for the defendant, the judgment to be final must state that he is dismissed without day, or that the plaintiff take nothing by his suit. Bonnell v. Campbell, 143 Ill. App. 351; Harvey v. Cochran, 103 Ill. App. 576; Murdock, et al. v. The Calgary Colonization Co., 186 Ill. App. 232. In the case of The People v. The Board of Education, 236 Ill. 154, the Supreme Court in passing upon an order entered in that case determined that it was not a final appealable order, though it recites that the petitioner excepts to the ruling of the court and abides by his petition for mandamus, and that the defendants recover their costs from such petitioner; and quoted with approval from the opinion of the court in Chicago Portrait Co. v. Crayon Co., 217 Ill. 200, wherein the court said:

> "The judgment was not final and the statute only authorizes appeals from final judgments. The Circuit Court merely sustained a demurrer to the declaration, and neither adjudged that the plaintiff take nothing by the writ or that the defendant go hence without day, and the judgment contained no words of equivalent meaning. There was no trial of any issue resulting in a finding for the defendant, as there was no issue to be tried and there was nothing in the nature of a determination of the rights of the parties. Such a judgment is not final."

Applying the rules referred to by the court in this opinion, there is but one conclusion to be reached, and that is that

and terms on appeal, which appeal is hereby allowed upon jurisdictional ground based on the use of 1983, in civil rights suits and all of constitutional rights suits."

The contention is also made that the order is interlocutory and not final, but such contention is not supported by citations of authorities. The court, however, upon an analysis of authoritative cases, finds that the Supreme and Appellate Courts, in cases analogous to the instant case, enunciate certain rules which are guides in the determination of this question and which are to the effect that the order must terminate and finally and completely dispose of the action. And if for the defendant, the judgment to be final must state that he is dismissed without day, or that the plaintiff take nothing by the suit. Bennett v. Bennett, 141 Ill. App. 481; Barker v. Cummins, 103 Ill. App. 474; Burkett, et al. v. The Chicago Telephone Co., 186 Ill. App. 182. In the case of The People v. The Board of Education, 258 Ill. 164, the Supreme Court in passing upon an order entered in that case determined that it was not a final appealable order, though it recited that the petitioner excepts to the ruling of the court and abides by his petition for mandamus, and that the defendants recover their costs from such petitioner; and quoted with approval from the opinion of the court in Chicago Terminal Co. v. Cleveton Co., 217 Ill. 209, wherein the court said:

> "The judgment was not final and the statute only authorizes appeals from final judgments. The Circuit Court merely sustained a demurrer to the declaration, and neither adjudged that the plaintiff take nothing by the writ or that the defendant go hence without day, nor the judgment contained no words of equivalent meaning. There was no trial of any issue involving in a finding for the defendant, as there was no issue to be tried and there was nothing in the nature of a determination of the rights of the parties. Such a judgment is not final."

Applying the rules referred to by the court in this opinion, there is but one conclusion to be reached, and that is that

the order is not final and is not such as finally and completely disposes of this action; and further, it is not a judgment stating that the defendant is dismissed without day, or that the plaintiff takes nothing by his suit;but the substance of the order is, "that judgment be entered for the defendant and against the plaintiff for want of prosecution, at plaintiff's costs."

The record itself shows that the plaintiff's suit was dismissed for want of prosecution. It is not the record of a final judgment, and therefore this order is no bar to another suit for the same cause of action. Harvey v. Cochran, supra.

Having reached the conclusion that the judgment is not final, we have no jurisdiction to dispose of the other questions raised on appeal. Chicago Portrait Co. v. Crayon Co., supra.,

This being an appeal from an interlocutory order, it must necessarily, and for the reasons indicated, be dismissed.

APPEAL DISMISSED.

WILSON, P.J. AND FRIEND, J. CONCUR.

the order is not final and is not such as finally and conclusively dispose of this action and further, it is not a judgment stating that the defendant is dismissed without day, or that the plaintiff take nothing by his suit;but the substance of the order is, "that judgment be entered for the defendant and against the plaintiff for want of prosecution, as plaintiff's costs."

The record itself shows that the plaintiff's suit was dismissed for want of prosecution. It is not the record of a final judgment, and therefore this order is no bar to another suit for the same cause of action. Bates v. Dayton, supra.

Having reached the conclusion that the judgment is not final, we have no jurisdiction to review of its merits questions raised on appeal. Dilmore Foundry Co. v. Dixon Co., supra.

This being an appeal from an interlocutory order, it must necessarily, and for the reasons indicated, be dismissed.

APPEAL DISMISSED.

Allen, J.J. and Jones, J. concur.

34656

THEODORE W. HAHRATH, et al.,
Appellees,

v.

WILLIAM LANGERT,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

261 I.A. 649

Opinion filed April 15, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This was an action in assumpsit in the Circuit Court of Cook County to recover the unpaid installments under a contract of sale of a certain business owned by the plaintiffs known as the Surpass Table Mat Company. A verdict was returned for the plaintiffs in the sum of $2500, and after motions for a new trial and in arrest of judgment, the court entered a judgment on the verdict, from which the defendant appeals.

The declaration consists of two counts, the first of which set forth the contract between the parties, and alleged that the defendant promised to pay in addition to other payments set forth in said contract, the sum of $3500 in six equal consecutive semi-annual payments. The second count was one of the common counts for goods sold and delivered. The declaration was verified by one of the plaintiffs. The defendant pleaded the general issue and filed an affidavit of merits, which was afterwards amended by leave of court. As amended, it alleged several breaches of the contract of sale by the plaintiffs.

On the 16th day of December, 1925, the plaintiffs and the defendant entered into a written agreement, which provided, in substance, that the plaintiffs, father and son, being the owners of a manufacturing business known as Surpass Table Mat Company, agreed to sell and the defendant agreed to buy and take over said

Opinion filed April 15, 1931

Mr. JUSTICE CLARK delivered the opinion of the court.

This was an action in assumpsit in the Circuit Court of Cook County to recover the special indemnity under a contract of sale of a certain business owned by the plaintiffs known as the Burgess Table Mat Company. A verdict was returned for the plaintiffs in the sum of $2500, and after motions for a new trial and in arrest of judgment, the court entered a judgment on the verdict, from which the defendant appeals.

The declaration consists of two counts, the first of which set forth the contract between the parties, and alleged that the defendant promised to pay in addition to other payments set forth in said contract, the sum of $2500 in six equal consecutive semi-annual payments. The second count was one of the common counts for goods sold and delivered. The declaration was verified by one of the plaintiffs. The defendant pleaded the general issue and filed an affidavit of merits, which was afterwards amended by leave of court. As amended, it alleged several breaches of the contract of sale by the plaintiffs.

On the 15th day of December, 1925, the plaintiffs and the defendant entered into a written agreement, which provided, in substance, that the plaintiffs, father and son, being the owners of a manufacturing business known as Burgess Table Mat Company, agreed to sell and the defendant agreed to buy and take over said

business under the name and style of Surpass Table Mat Company, including the good will thereof, and all of the machinery and equipment.

The contract of sale provided that the defendant was to pay over to the plaintiffs the sum of $1,000, which was done; and in addition was to pay the sum of $1,000 on January 15, 1926; the sum of $500 on May 1, 1926, and the balance of $3500 in six equal consecutive semi-annual payments, commencing on November 1, 1926, and that none of said payments were to bear interest.

The contract further provided that "failure on the part of the party of the second part to make such payments will automatically terminate the obligations of both parties hereunder."

Certain representations were made a part of said contract, to-wit, that the plaintiffs had applications for patents pending covering the process of manufacturing said mats and that they would supply and deliver to the defendant all mats required by him in conducting his business; that said mats so to be delivered by the plaintiffs were to be on the basis of ten per cent above cost, and not in any event to exceed the price of $1.70 per 36-inch mat in any width called for by the party of the second part not to exceed 48 inches and four cents per running inch thereafter, and that the plaintiffs agreed not to sell their patent rights covering said process or permit any other person to manufacture under said patent rights at any time hereafter.

From the evidence offered by the plaintiffs, it appears that Theodore H. Hanrath and his son, Theodore Hanrath, Jr. were associated as co-partners in business at 355 Union Park Court, manufacturing a special type of cork-insulated table pad. At the time of entering into the contract with the defendant Langert, the plaintiffs had a patent pending on said process in Washington. Prior to

business under the name and style of Smyrna Table Net Company, including the good will thereof, but all of the machinery and equipment.

The contract of sale provided that the defendant was to pay over to the plaintiffs the sum of $1,000, which was done; and in addition was to pay the sum of $1,000 on January 15, 1928; the sum of $800 on May 1, 1928, and the balance of $3800 in six equal consecutive semi-annual payments, commencing on November 1, 1928, and that none of said payments were to bear interest.

The contract further provided that failure on the part of the party of the second part to make such payments will automatically terminate the obligations of both parties hereunder.

Certain representations were made a part of said contract, to-wit, that the plaintiffs had applications for patents pending covering the process of manufacturing nets and that they would supply and deliver to the defendant all nets required by him in conducting his business; that nets so to be delivered by the plaintiffs were to be on the basis of ten per cent above cost, and not in any event to exceed the price of $1.70 per 36-inch net in any width called for by the party of the second part not to exceed 48 inches and four cents per running inch thereafter; and that the plaintiffs agreed not to sell their patent rights covering said process or permit any other person to manufacture under said patent rights at any time hereafter.

From the evidence offered by the plaintiffs, it appears that Theodore T. Sturtz and his son, Theodore Sturtz, Jr., were associated as co-partners in business at 328 Union Arcade Court, manufacturing a special type of cork-insulated table pad. At the time of entering into the contract with the defendant Company, the plaintiffs had a patent pending on said process in Washington. Prior to

December 16, 1925, they had not received any notice of the rejection of the patent. After the contract was signed and delivered, the plaintiffs ran the business for the defendant for about a month; At the end of the month the defendant came in and took possession, and the plaintiffs moved out of the premises on June 30, 1926. In that six months' period the plaintiffs made interior parts of table mats, as called for in the contract on behalf of the defendant.

Langert the defendant paid $2500 on the contract. In addition, the defendant paid the plaintiffs for some of the table mat interiors manufactured and delivered to him. On June 1, 1926, the plaintiffs refused to deliver to Langert any more table mat interiors unless paid for C. O. D., as Langert had failed to meet the installment notes for the balance of said purchase price of said business as the notes became due.

The physical assets turned over to the defendant at the time the contract was entered into, consisted of certain drying racks, pasting tables, glue boilers, packing benches, material racks, layout table, trimming machine, and other property necessary to carry on this particular manufacturing business.

In addition, it appears from the evidence offered by the plaintiffs that the defendant Langert, under oath, stated in an application for incorporation filed in Springfield, Illinois, in June, 1926, that the value of the fixtures he had secured from the plaintiffs was $2,416.67; that he also listed the value of these fixtures with R. G. Dun & Company as $2,983.53, and that after the final rejection of the plaintiffs' application for a patent, the defendant continued to make these table pads, using the same equipment that he took over from the plaintiffs, and the same process.

It is the contention of the defendant that by the express terms of the contract the executory obligations of both parties thereto were terminable at the will of the defendant; that the <u>status</u>

December 16, 1955, they had not received any notice of the rejection of the patent. After the contract was signed and delivered, the plaintiffs sue the business for the defendant for about a month; at the end of the month the defendant came in and took possession, and the plaintiffs moved out of the premises on June 30, 1956. In that six months' period the plaintiffs made interior parts of table sets, as called for in the contract on behalf of the defendant.

Largely the defendant paid $2500 on the contract. In addition, the defendant paid the plaintiffs for some of the table sets plaintiffs manufactured and delivered to him. On June 1, 1956, the plaintiffs refused to deliver to Imagent any more table set interiors unless paid for. O. D., as Imagent had failed to meet the installment notes for the balance of said purchase price of said machines as the notes became due.

The physical assets turned over to the defendant at the time the contract was entered into, consisted of certain drying racks, parting tables, glue boilers, parting machines, metrical molds, layout table, sizing machine, and other property necessary to carry on this particular manufacturing business.

In addition, it appears from the evidence offered by the plaintiffs that the defendant Imagent, under oath, stated in an application for incorporation filed in Springfield, Illinois, in June, 1956, that the value of the fixtures he had secured from the plaintiffs was $2,416.67; that he also listed the value of these fixtures with R. G. Dun & Company as $5,885.53, and that after the final rejection of the plaintiffs' application for a patent, the defendant continued to make these table pads, using the same equipment that he took over from the plaintiffs, and the same process.

It is the contention of the defendant that by the express terms of the contract the reciprocal obligations of both parties thereto were dependent on the fulfillment of the defendant's obligations.

one need not be restored, and that this is not a case of rescission of a contract by the defendant for a breach on the part of the plaintiff, but is one which involved the exercise of a right under the contract to terminate it.

The answer of the plaintiffs to this contention is that an important function of the court is the enforcement of lawful contracts and the protection of contract rights. The court will not tolerate such an inequity as permitting one party to a contract to receive all the benefits of the same, and by the simple expedient of refusing to pay under the contract, terminate all his obligations to the other party. This court agrees that one of the functions of the courts is the enforcement of lawful contracts.

In order to construe the contract, which is the subject of this lawsuit, and determine its enforceability, we will determine from the document itself the intention of the parties when they entered into the agreement. From an examination thereof it appears that the provision,

> "Failure on the part of the party of the second part to make such payments will automatically terminate the obligations of both parties hereunder."

is a part of the contract. It will be noted that the contract does not fix a duration of time the same shall continue in force, except that the plaintiffs perpetually grant to the defendant the sole and exclusive right to sell mats in certain counties in the States of Michigan, Indiana, Wisconsin, Iowa and Illinois. Then, there is no maximum or minimum quantity of mats to be delivered to the defendant, the quantity to be supplied by the plaintiffs being all mats required by the defendant in conducting his business. Under this provision, the defendant might not require any mats if the business did not warrant it, or he might demand such large quantities that it would be wholly beyond the capacity of the plaintiffs to make delivery.

The quoted provision of the contract is but an expression

man must not be rendered, and that this is not a case of rescission of a contract by the defendant for a breach on the part of the plaintiff, but is one which involved the exercise of a right under the contract to terminate it.

The answer of the plaintiffs to this contention is that on important functions of the court is the enforcement of legal remedies and the protection of contract rights. The court will not tolerate such an improper as permitting one party to a contract to remain all the benefits of the same, and by the simple expedient of refusing to pay money due contract, terminate all his obligations to the other party. This court agrees that one of the functions of courts is the enforcement of legal contracts.

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"Failure on the part of the party of the second part to make payments will automatically terminate the obligations of both parties hereunder."

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The quoted provision of the contract is but an expression

of the law that applies to the rights of the parties under this contract, and would apply to its enforcement in the absence of such a provision.

There is no doubt, as we view the law, that the contract is void for want of mutuality. Where no time is fixed during which the contract is to continue in force, it is terminable at the will of the parties, and this right of the defendant to terminate was inserted in the contract by the parties.

In the case of Joliet Bottling Co. v. Brewing Co., 254 Ill. 215, the court in its opinion passed upon a contract, and its ruling in that case is applicable to the contract now under consideration. The court said:

> "The only thing the contract bound appellant to do was to pay the price agreed upon and bottle the beer of appellee and to market the same as the product of appellee so long as it furnished beer satisfactory in quality and in such quantities as the trade demanded. No mention is made of any period of time the agreement should continue in force. No maximum or minimum quantity is stipulated in the agreement, but the quantity to be delivered is such a s shall be sufficient to supply appellant's demand. Under this provision appellant might demand a quantity so small as to make it impracticable for appellee to manufacture it, or it might demand such large quantities as to be wholly beyond the capacity of appellee. * * * It cannot be doubted, we think, that the contract was unilateral and void for want of mutuality under repeated decisions of this and other courts. (Vogel v. Pekoc, 157 Ill. 339; Higbie v. Rust, 211 id. 333; Bailey v. Austrian, 19 Minn. 535; Crane v. Crane & Co. 105 Fed. Rep. 869; Davie v. Lumbermen's Mining Co. 53 N. W. Rep. 625.) Furthermore, no time being fixed during which the agreement should continue in force, it was terminable at the will of either party. Davis v. Fidelity Fire Ins. Co. 208 Ill. 375; Orr v. Ward, 73 id. 318; Irish v. Dean, 39 Wis. 562."

In reply to the contention of the plaintiffs that it is an injustice for the defendant to keep and enjoy the benefits of the contract and escape its obligations to the plaintiffs, it is the duty of this court to apply the law in construing this contract, and that only. We cannot make a contract for the parties; we can only construe it.

What, if any remedy the plaintiffs have other than to recover under the provisions of the contract, is not before us at this time; nor is it necessary for us to advise the parties with

of the law that applies to the rights of the parties under this contract, and would apply to its enforcement in the absence of such a provision.

There is no doubt, as we view the law, that the contract is void for want of mutuality. Such as that is fixed only when the contract is to continue in force, it is terminable at the will of the parties, and this right of the defendant to terminate was inserted in the contract by the parties.

In the case of Smith Publishing Co. v. Johnson Co., 184 Ill. 312, the court in its opinion passed upon a contract, and its ruling in that case is applicable to the contract now under consideration. The court said:

"The only thing the contract bound appellants to do was to pay the value agreed upon and hold the book of appellee and to market the same as the product of appellee as long as it furnished best satisfactory in quality and in such quantities as the trade demanded. No section is made of any period of time the agreement should continue in force. No machine or minimum quantity is stipulated in the agreement, but the quantity to be delivered is such as should be sufficient to supply appellant's demand. Under this provision appellant might demand a quantity so small as to make it impracticable for appellee to manufacture it, or it might demand such large quantities as to be wholly beyond the capacity of appellee. * * * It cannot be doubted, we think, that the contract was contingent and with for want of mutuality under respective decisions of this and other courts. (Vogel v. Peter, 187 Ill. 219; Eagle v. Rust, 111 Ill. 339; Bailey v. Austrian, 12 Ill. 239; Crane v. Crane & Co., 116 Ill. 549; Bell Brick v. Lumberman's Mining Co., 87 N. Y. 167.) Furthermore, as that being first during which the agreement should continue in force, it was terminable at the will of either party. Davis v. Finality Tire Inc., 96 App. 111; Ott v. Hurd, 71 Ia. 319; Lake v. Dean, 39 Ia. 369."

In reply to the contention of the plaintiffs that it is an injustice for the defendant to keep and enjoy the benefits of the contract and escape its obligations to the plaintiff, it is the duty of this court to apply the law in construing this contract, and that only. We cannot make a contract for the parties; we can only construe it.

That, if any remedy the plaintiffs have other than to recover under the provisions of the contract, is not before us at this time; nor is it necessary for us to advise the parties with

respect thereto.

For the reasons stated, the judgment is reversed and judgment entered here for the defendant at plaintiff's costs; and therefore it will not be necessary to pass upon the other questions in the record.

JUDGMENT REVERSED AND JUDGMENT HERE
FOR DEFENDANT.

WILSON, P.J. AND FRIEND, J. CONCUR.

Proposed Theorem.

For the reason given, the judgment is reversed and judgment entered here for the defendants in accordance with this opinion. Each party will be responsible for their own costs in the district.

JUDGMENT REVERSED AND JUDGMENT ENTERED FOR DEFENDANTS.

ELLIOTT, P.J. AND BRIEN, J. CONCUR.

34641

WILLIAM SCHUKRAFT and MARGARET J. SCHUKRAFT,	APPEAL FROM
Plaintiffs-Appellees,	MUNICIPAL COURT
v.	OF CHICAGO.
JOHN G. KRUTZLER and ROSIE KRUTZLER,	
Defendants-Appellants.	

261 I.A. 649

Opinion filed May 13, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Plaintiffs, William Schukraft and Margaret J. Schukraft, his wife, obtained judgment by confession in the Municipal Court of Chicago against John G. Krutzler and Rosie Krutzler, his wife, defendants, for the sum of $2,760, under a lease dated December 11, 1925. On motion of defendants the judgment was opened and the defendants given leave to defend. The cause was tried by the court without a jury, resulting in a finding for the plaintiffs and against the defendants for the sum of $300, upon which finding judgment was entered and this appeal taken.

The lease in question was for a term running from January 1, 1926, until the 31st day of December, 1930, at a stipulated rental of $22,500, payable in monthly installments. For the twelve months from January 1, 1926, until December 31, 1926, the monthly rental was $275, and for the balance of the term up to and including December 31, 1930, the monthly rental was $400.

Defendants kept the premises in question until on or about June 15, 1926, and paid the rent as it became due up until that time. Upon that date, defendants sold their business to one Hamill Engesser and Elizabeth Engesser, his wife, and a certain Mrs. Jordt, and at the time of the sale of the business made and executed a

Opinion filed May 13, 1931

MR. JUSTICE DUFFY delivered the opinion of the court:

Plaintiffs, William Schmurff and Margaret A. Schmurff, his wife, obtained judgment by confession in the municipal Court of Chicago against John G. Kruntler and Rosie Kruntler, his wife, defendants, for the sum of $3,700, under a lease dated December 11, 1928. On motion of defendants the judgment was opened and the defendants given leave to defend. The cause was tried by the court without a jury, resulting in a finding for the plaintiffs and against the defendants for the sum of $600, upon which finding judgment was entered and this appeal taken.

The lease in question was for a term running from January 1, 1929, until the 31st day of December, 1930, at a stipulated rental of $32,500, payable in monthly installments. For the twelve months from January 1, 1931, until December 31, 1931, the monthly rental was $375, and for the balance of the term up to and including December 31, 1930, the monthly rental was $300.

Defendants kept the premises in question until on or about June 15, 1930, and paid the rent as it became due up until that time. Upon that date, defendants sold their business to one Kumill Sugeson and Mildredth Sugeson, his wife, and a certain Wre. Lotzt, and at the time of the sale of the business made and executed a

written assignment of the lease to the purchaser who, in turn, accepted the assignment in writing. A written consent of the plaintiffs, the owners of the premises, to the assignment of the lease was not obtained. Some evidence was introduced on the part of the defendants for the purpose of showing that there had been an assignment of the lease in writing, but, if there was such an instrument, it was not produced in evidence. Such evidence as there is relating to such a document, is of such an unsatisfactory character as to carry little weight. The fact that there was a written consent to the assignment was denied by the plaintiffs and the trial court was evidently of the opinion that it had not been proven.

The balance of the rent for the year 1926, was paid as it became due by the assignees, Engesser and his wife, and these payments were made directly to the plaintiffs. From January 1, 1927, until the end of that year the assignees, Engesser and his wife, mailed to the plaintiffs monthly checks for $325 each and receipts were sent to the defendant at 933 Fulton street, Chicago, Illinois, acknowledging the payments on account. January 1, 1928, the plaintiffs and the owners of the premises entered into a new lease with the Engessers, assignees of the defendants, and this suit was to recover the balance, amounting to $900, due for rent for the period from January 1, 1927 until December 31, 1927, - this balance consisting of the difference between the amount of $325 per month paid by the assignees under the lease and the rental of $400 per month stipulated in the lease.

Counsel for the defendants state as a ground for reversal that the acceptance of rent by the plaintiffs from defendants' assignees after plaintiffs had knowledge of the assignment, constituted a consent to the assignment and a waiver of the provision requiring such consent to be in writing, citing Johnson v. Hotel Lawrence Corp.,

written assignment of the lease to the purchaser who, in turn, accepted the assignment in writing. A written consent of the plaintiff, the owners of the premises, to the assignment of the lease was not obtained. Some evidence was introduced on the part of the defendants for the purpose of showing that there had been an assignment of the lease in writing, but, if there was such an instrument, it was not produced in evidence. Such evidence as there is relating to such a document, is of such an unsatisfactory character as to carry little weight. The fact that there was a written consent to the assignment was denied by the plaintiffs and the trial court was evidently of the opinion that it had not been proven.

The balance of the rent for the year 1928, was paid as it became due by the assignee, Sugarman and his wife, and these payments were made directly to the plaintiffs. From January 1, 1929, until the end of that year the assignee, Sugarman and his wife, mailed to the plaintiffs monthly checks for $125 each and receipts were sent to the defendant at 2[illegible] Dalton street, Chicago, Illinois, acknowledging the payments on account. January 1, 1929, the plaintiffs and the owners of the premises entered into a new lease with the Sugarmans, assignees of the defendants, and this suit was to recover the balance, according to [illegible], due for rent for the period from January 1, 1927 until December 31, 1927. - This balance consisting of the difference between the amount of $125 per month paid by the assignees under the lease and the rental of $[illegible] per month stipulated in the lease.

Counsel for the defendants state as a ground for reversal that the acceptance of rent by the plaintiffs from defendants' assignees after plaintiffs had knowledge of the assignment, constituted a consent to the assignment and a waiver of the provisions requiring such consent to be in writing, citing Jackson v. Ryan Inter-Ocean Co.,

337 Ill. 345, and other cases. These cases are not in point, but hold that acknowledgment of the assignment by the owner and an acceptance of rent by him from the assignee precludes him, the owner, from declaring a forfeiture of the lease. It is also insisted that the acceptance by the plaintiff of a reduced rental from the defendants' assignees during the year 1927, operated to discharge defendants from liability under the lease. But, with this we can not agree. The acceptance of rent by the plaintiff from the Engessers, assignees of the defendants, did not operate to discharge the defendants. The Supreme Court of this state in the case of Grommes, et al, v. St. Paul Trust Co., et al, 147 Ill. 634, in passing upon a question very similar to the one at bar, lays down the rule under such circumstances as those involved in this case. The court in its opinion says:

> "Nor did the sale of the saloon by the tenant to Ruse, nor the taking of possession by Ruse, nor the acceptance of rent from the latter by the landlord, operate as a discharge of the guarantors. The assignee of a leasehold estate is liable for the rent according to the terms of the lease, and the fact of his liability after the assignment does not discharge the lessee from his covenant to pay rent. In case the rent is not paid by the assignee as it becomes due, an action may be sustained against the lessee therefor; and it makes no difference, in this respect, that the lessor may have received rent from the assignee, and accepted him as tenant of the premises. (Shaw v. Partridge, 17 Vt. 626; 12 Am. & Eng. Enc. of Law, page 739). Where there is an express covenant to pay rent for a term of years, the mere acceptance of rent by the lessor from the assignee of the lessee does not discharge the lessee. (Harris v. Meackman, 62 Iowa, 411). The contract of the latter continues in force, notwithstanding he may have parted with his interest in the estate, unless the lessor enters into such stipulations with the assignee, as to accept him as sole tenant and absolve the original lessee. If there be not a substitution of the assignee in place of the original lessee, and a clear intent to make a new contract with the former and to discharge the latter from further liability under the lease, both will be held liable to the lessor. (Way v. Reed, 6 Allen. 364). Wood in his work on Landlord and Tenant says: 'An assignment of a lease by the lessee does not discharge either the lessee or his surety from the covenants. It does not have this effect even when the lessor recognizes the assignment by accepting rent from the assignee.' (Way v. Reed, supra; Hunt v. Gardner, 39 N. J. Law, 530; Almy v. Greene, 13 R. I. 530; Damb v. Hoffman, 3 E.D. Smith, 361.)

327 Ill. 363, and other cases. These cases are not in point, but hold that acknowledgments of the assignment by the owner and an acceptance of rent by him from the assignee precludes him, the owner, from declaring a forfeiture of the lease. It is also insisted that the acceptance by the plaintiff of a reduced rental from the defendants' assignee during the year 1937, operates to discharge defendants from liability under the lease. But, with this we can not agree. The acceptance of rent by the plaintiff from the lessees, assignees of the defendants, did not operate to discharge the defendants. The supreme court of this state in the case of Freeman, et al. v. St. Louis Trust Co., et al. 147 Ill. 664, in passing upon a question very similar to the one at bar, lays down the rule under such circumstances as those involved in this case. The court in its opinion says:

"Nor did the sale of the union by the tenant to Dunn, nor the taking of possession by Dunn, nor the acceptance of rent from the latter by the landlord, operate as a discharge of the covenantor. The assignee of a leasehold estate is liable for the rent accruing on the terms of the lease, and the fact of his liability after the assignment does not discharge the lessee from the covenants in the lease. In case the rent is not paid by the assignee as it becomes due, an action may be maintained against the lessee therefor, and it makes no difference, in this respect, that the lessee may have received rent from the assignee, and accepted him as tenant of the premises. (Dunn v. Coleman, 17 Ill. 238; 12 Am. R. 48, 49, of Law, page 238). Nor does it do away with the necessity of the lessee to pay the rent of years, the mere acceptance of rent by the lessor from the assignee of the lessee does not discharge the lessee. (Tuttle v. Bennett, 20 Iowa, 421). The contract of the lessee continues in force, notwithstanding he may have parted with his interest in the estate, unless the lessor enters into new relationship with the assignee, as accepts him as sole tenant and absolves the original lessee. If there be not a substitution of the assignee in place of the original lessee, and a mere lessor be made a new contract with the lessor and to discharge the lessee from further liability under the lease, he will be held liable to the lessor. (Cox v. Jones, 2 Allen, 324). Good in his work on Landlord and Tenant says: 'An assignment of a lease by the lessee does not discharge either the lessee or his surety from the covenants. It does not have this effect even when the lessor recognizes the assignee by accepting rent from the assignee.' (Cox v. Jones, supra; Cartwright v. Gardner, 39 N. Y. 294; Lyon v. Jackson, 17 Ch. D. 320; Cox v. Bateman, 2 Ch. D. 548, 554.)

> A surety for the tenant may set up, in defense to an action against him, any matter that operates as a discharge of the tenant from liability upon the lease. But the landlord must create a new tenancy by agreeing to accept the subtenant, or assignee of the lease, as his tenant, and by accepting such subtenant or assignee in substitution for the original lessee, before the latter will be discharged, and, by consequence, before the sureties of the latter will be discharged. Damb v. Hoffman, 3 E. D. Smith, 361; 2 Wood's Land and Ten. secs. 470, 494, 495, pages 1083, 1084, 1178; White v. Walker, 31 Ill. 422; Bailey v. Delaplaine, 1 Sandf. 5; Grant v. Smith, 46 N. Y. 95). 'Where it is mutually agreed between parties that a lease shall be surrendered, and a new one is thereupon made with another party, and the landlord accepts the new party as his tenant, this will estop the landlord thereafter from denying the surrender of the first lease.' (Dills v. Stobie, 81 Ill. 208; Williams v. Vanderbilt, 145 id. 338.)"

From the rule as expressed in the opinion of the Supreme Court in the case cited, it appears that there must have been a clear intent on the part of the owner of the premises to release the original lessee from further liability, and that unless such clear intent appears, the lessee will be liable under the lease.

The plaintiff, William Schukraft, testified that the receipts for rent were made out to Krutzler and the payments of $325 were credited on account. In this he is supported by his bookkeeper who made out the receipts. Plaintiff also testified that he had a talk with Krutzler and informed him that the rent was being paid in a sum less than the amount in the lease and that he, the plaintiff, would hold the defendants for the difference. He further testified that he informed Krutzler, who had called to see him in regard to the lease and the payments thereunder, that he would not consent to an assignment because he did not know whether the new tenants were responsible.

From an examination of the testimony, we are of the opinion that there was no understanding between the parties which would amount to an agreement to substitute the Engessers for the defendants as tenants under the lease. Moreover, the cause was tried

A survey for the tenant may not so, in defense to an action against him, say rather that operates as a discharge of the tenant from liability upon the lease. But the landlord may create a new tenancy by expressly or nearly the abatement, or waiving of the lease, or his option, and by accepting such surrender or assignment for the original lessee, before the latter will be discharged, and, by consequence, before the surrender of the latter will be discharged. Mann v. Lawrence, 2 C. B. 1015, 1021; Doe's lessee and Lee, 4 East, 477, 478, 479, Doe v. Lock, 1 Ad. & E. 1, 11; Wilde v. Waldron, 24 Ill. App. 1, 4; Tallmadge v. Sherwood, 3 Conn. 10, 12; Smith v. Smith, 16 N. J. Eq. 6. 'Where it is mutually agreed between parties that a lease shall be surrendered, and a new one in thereupon made with another party, and the landlord accepts the new party as his tenant, this will serve the landlord therefrom from charging the surrender of the first lease.' (Mann v. Lawrence, 2 C.B. 1015) Tallmadge v. Sherwood, 3 Conn 10.'

From the rule as expressed in the opinion of the Supreme Court in the case cited, it appears that there must have been a clear intent on the part of the owner of the premises to release the original lessee from further liability, and that unless such clear intent appears, the lessee will be liable under the lease.

The plaintiff, Julius Dalgarno, testified that the receipts for rent were made out to Kreisler and the payments of $325 were credited on account. In this he is supported by his bookkeeper who made out the receipts. Plaintiff also testified that he had a talk with Kreisler and informed him that the rent was being paid in a sum less than the amount in the lease and that he, the plaintiff, would hold the defendants for the difference. He further testified that he informed Kreisler, who had called to see him in regard to the lease and the payments thereunder, that he would not consent to an assignment because he did not know whether the new tenants were responsible.

From an examination of the testimony, we are of the opinion that there was no understanding between the parties which would amount to an agreement to substitute the lessees for the defendants as tenants under the lease. However, the mere mutual

by the court without a jury and the trial court was in a much better position to observe the witnesses and weigh their testimony than would be this court, and we are not inclined to substitute our judgment for that of the trial court.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

by the court without a jury and the trial court was in a more
natural position to assess the witnesses and weigh their testimony
than would be this court, and we are not justified in substituting our
judgment for that of the trial court.

For the reasons stated in this opinion, the judgment
of the municipal court is affirmed.

CONCURRING OPINION.

BOYER AND BOYER, JJ., CONCUR.

34665

CHARLES HORN, doing business as CHARLES HORN LUMBER COMPANY, Appellee,	APPEAL FROM
v.	CIRCUIT COURT
JOHN BRENNAN, doing business as JOHN BRENNAN & CO., Appellant.	COOK COUNTY.

261 I.A. 649

Opinion filed May 13, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This was an action brought by Charles Horn, doing business as Charles Horn Lumber Company, plaintiff, against John Brennan, doing business as John Brennan & Co., defendant, to recover on certain alleged agreements under which the plaintiff sold and the defendant received, or agreed to receive, certain cars of lumber.

The cause naturally divides itself into two propositions: The first involves the alleged sale of 4 certain cars of lumber to the defendant which the defendant received and sold and failed to pay for. These cars were M. & O. Car No. 22310, P. M. Car No. 7535, C. B. & Q. Car No. 97148, C. & N. W. Car No. 121546. The invoices bear different dates during the year 1924. The second proposition deals with B. & O. Car No. 187059, bearing invoice date 3-16-27, which was rejected by the defendant on delivery and afterwards sold at a reduced price and defendant charged with the difference.

As to the first 4 cars, plaintiff claims that it was a sale and defendant insists that the cars were placed in defendant's yard on consignment. Each of the 4 cars was received by the defendant, together with an invoice showing the amount, description and price of the lumber.

Plaintiff testified that as to car No. 7535, a conversation was had between himself and the defendant by which it was agreed that the price was to be changed from $84 per thousand feet

CHARLES HORN, doing business as
CHARLES HORN LUMBER COMPANY,

Appellee,

v.

JOHN STRAUSS, doing business as
JOHN STRAUSS & CO.,

Appellant.

Opinion filed May 13, 1931

MR. JUSTICE DUFFICY WILSON delivered the opinion of the court.

This was an action brought by Charles Horn, doing business as Charles Horn Lumber Company, plaintiff, against John Strauss, doing business as John Strauss & Co., defendant, to recover on certain alleged agreements under which the plaintiff sold and the defendant received, or agreed to receive, certain cars of lumber.

The cause originally filed two propositions:

The first involves the alleged sale of 4 certain cars of lumber to the defendant which the defendant received and sold and failed to pay for. These cars were c. & O. Car No. 88310, P. R. Car No. 7285, C. B. & Q. Car No. 37148, C. & N. W. Car No. 121646. The invoices bear different dates during the year 1926. The second proposition deals with B. & O. Car No. 187088, bearing invoice date 8-16-27, which was rejected by the defendant on delivery and afterwards sold at a reduced price and defendant charged with the difference.

As to the first 4 cars, plaintiff claims that it was a sale and defendant insists that the cars were placed in defendant's yard on consignment. Each of the 4 cars was received by the defendant, together with an invoice showing the amount, description and price of the lumber.

Plaintiff testified that as to car No. 7285, a conversation was had between himself and the defendant by which it was agreed that the price was to be changed from $94 per thousand feet

to $83 per thousand feet. This was some time after the sale and just prior to February 1, 1926. The defendant in his testimony corroborates this evidence. It consequently appears that the price was agreed upon between the parties as to this car. As to the other cars the prices appear to have been fixed in the invoices.

We are of the opinion that the correspondence, invoices and conversations between the parties as to the first 4 cars constituted a sale, but that the purchase price for said lumber was to be paid by the defendant to the plaintiff as the lumber was sold. At the time of the trial all of the lumber had been sold or disposed of, and the trial court correctly held that the defendant was liable for the purchase price and properly directed the jury to find for the plaintiff as to these 4 cars.

The second proposition has to do with B. & O. Car No. 187059. It appears that when this car was delivered to the defendant it was rejected as unsatisfactory and was afterwards sold by the plaintiff to the Villa Park Lumber Co., which company accepted the car and paid $80 per thousand feet for the lumber. There was evidence that this $80 per thousand feet was the fair reasonable value of the lumber at the time of the sale to the Villa Park Lumber Co. The price of this car to the defendant was $81 per thousand and there was in the car at the time 25,002 feet. The damage sustained was the difference between the agreed price and the sale price, plus the demurrage and other charges. The jury found the issues as to this car in favor of the plaintiff and incorporated the damages in its verdict. No question is raised as to the amount of the verdict nor the amount of the damages proven and alleged to have been sustained by the plaintiff.

It is urged, however, that the court erred in admitting improper evidence on behalf of the plaintiff and in refusing to admit proper evidence on behalf of the defendant. We have examined the record

to 121 per thousand feet. This was some time after the sale had just prior to January 1, 1928. The difference in the testimony corroborates this evidence. It consequently appears that the price was agreed upon between the parties as to this car. As to the other cars the prices appear to have been fixed in the invoices.

We are of the opinion that the correspondence, invoices and conversations between the parties in the Trial Court establish a sale, but that the purchase price for said lumber was to be paid by the defendant to the plaintiff as the lumber was sold. At the time of the trial all of the lumber had been sold or disposed of, and the trial court correctly held that the defendant was liable for the purchase price and properly directed the jury to find for the plaintiff as to these 4 cars.

The second proposition has to do with R. & O. Car No. 10700. It appears that when this car was delivered to the defendant it was rejected as unsatisfactory and was afterwards sold by the plaintiff to the Ville Port Lumber Co., which company accepted the car and paid 120 per thousand feet for the lumber. There was evidence that this 120 per thousand feet was the fair reasonable value of the lumber at the time of the sale to the Ville Port Lumber Co. The price of this car to the defendant was 121 per thousand and there was in the car at the time 60,000 feet. The damage sustained was the difference between the agreed price and the sale price, plus the demurrage and other charges. The jury found the issues as to this car in favor of the plaintiff and interpreted the damages in the verdict. No question is raised as to the amount of the verdict nor the amount of the damages proven and alleged to have been sustained by the plaintiff.

It is urged, however, that the court erred in admitting improper evidence on behalf of the plaintiff and in refusing to admit proper evidence on behalf of the defendant. We have examined the record

and find there is only one question as to the admission of evidence on the part of the plaintiff which might have been objectionable. Plaintiff introduced in evidence the report made by the Oak Flooring Manufacturer's Association, made after an inspection of the car by one of its agents. That this inspection had been made was known to the defendant. The plaintiff testified that on one of his visits to see Mr. Brennan with regard to this car, he showed him, Brennan, the report, so that it would appear from the plaintiff's testimony that Mr. Brennan was familiar with its contents. The document was evidently shown to the defendant by the plaintiff for the purpose of convincing him of the quality of the lumber. A number of other witnesses testified as to the quality of the lumber, including the manager of the Villa Park Lumber Co. which purchased the lumber in question. This witness testified that he examined the lumber more particularly because it had been a rejected car. The document objected to would have been inadmissible in evidence if offered in substantiation of plaintiff's case without any other connection. But, if presented by the plaintiff to the defendant and discussed by them, it would becomme admissible as part of the discussion as to whether the lumber was of suitable grade. The association which made the inspection appears to have been an independent association, recognized by the trade, and its duties appear to have included the duty of inspection where disputes arose among members of the association or others engaged in the lumber business.

In view of the amount of testimony on this question by others, we do not believe that the error, if any, in admitting the document into evidence would constitute reversible error. We are of the opinion that a reversal of the cause, on account of the admission of this document in evidence, would result in no good purpose and that substantial justice requires affirmance of the judgment of the Circuit Court.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

and that there is only one question as to the admission of evidence on the part of the plaintiff which might have been objectionable. Counsel introduced in evidence the report made by the Bank Inspector Schmidt-Hunter's department, such after an inspection of the car by one of its experts. That this inspection had been made was known to the defendant. The plaintiff testified that on one of his visits to see Mr. Stevens with regard to this car, he showed him, Stevens, the report, so that it would appear from the plaintiff's testimony that Mr. Stevens was familiar with its contents. The document was evidently shown to the witness at in the plaintiff for the purpose of convincing him of the quality of the lumber. A number of other witnesses testified as to the quality of the lumber, including the manager of the Villa Park Lumber Co. which purchased the lumber in question. This witness testified that he examined the lumber more particularly because it had been a rejected car. The document objected to would have been inadmissible in evidence if offered in substantiation of plaintiff's case without any other summarization. But, if presented by the plaintiff to the defendant and discussed by them, it would become admissible as part of the discussion as to whether the lumber was of suitable grade. The conversation which took the inspection appears to have been an independent conversation, recognized by the trial, and the Judge seems to have included the duty of inspection which Stevens owed to the manufacturer of the materials or others engaged in the lumber business.

In view of the amount of testimony on this question by others, we do not believe that the error, if any, in admitting the document into evidence would constitute reversible error. In are of the opinion that a reversal of the cause, on account of the admission of this document in evidence, would result in no good purpose and that substantial justice requires affirmance of the judgment of the circuit court.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BARR, ACT PRIOR, Mr. STONE.

34686

A. B. LIND,

(Plaintiff) Appellant,

v.

COLLETTA ELLSWORTH and MRS. M. ELLSWORTH,

(Defendants) Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

261 I.A. 650

Opinion filed May 13, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Plaintiff, Lind, obtained judgment on a note by confession in the Municipal Court against Colletta Ellsworth and Mrs. M. Ellsworth. Defendants filed their petition to vacate said judgment and be allowed to plead. The judgment was opened and defendants permitted to defend.

The affidavit of defense admits that the defendants executed and delivered to the plaintiff the note sued upon, and that Colletta Ellsworth was the maker and Mrs. Ellsworth the guarantor; charges the note was given for a loan and secured by a chattel mortgage on an automobile owned by Colletta Ellsworth. The affidavit further charges that nothing was owing to the plaintiff on said note, but, that on the other hand, the plaintiff was indebted to the defendant, Colletta Ellsworth, in the sum of $263.92 because of money paid on account and for a balance due the defendant, Colletta Ellsworth, from the sale of the automobile by plaintiff under the chattel mortgage.

The cause was heard by the court without a jury and resulted in a finding in favor of the defendants and judgment for both defendants in the amount of $263.92. We are unable to conceive upon what theory the court entered judgment for both defendants, as the set-off was claimed by only one. The defendant, Mrs. Ellsworth,

Opinion filed May 13, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Plaintiff, also, entered judgment on a note by verdict in the municipal court against Collette Ellsworth and Mrs. E. Ellsworth. Defendants filed their petition to vacate said judgment and be allowed to plead. The judgment was opened and defendants permitted to defend.

The affidavit of defense admits that the defendants executed and delivered to the plaintiff the note sued upon, and that Collette Ellsworth was the maker and Mrs. Ellsworth the guarantor; charges the note was given for a loan and secured by a chattel mortgage on an automobile owned by Collette Ellsworth. The affidavit further charges that nothing was owing to the plaintiff on said note, but, that on the other hand, the plaintiff was indebted to the defendant, Collette Ellsworth, in the sum of $363.92 because of money paid on account and for a balance due the defendant, Collette Ellsworth, from the sale of the automobile, by plaintiff under the chattel mortgage.

The cause was heard by the court without a jury and resulted in a finding in favor of the defendants and judgment for both defendants in the amount of $363.92. We are unable to conceive upon what theory the court entered judgment for both defendants, as the note was claimed by only one. The defendant, Mrs. Ellsworth,

only claimed as guarantor and could not, necessarily, be entitled to a judgment against the plaintiff.

It appears from the pleadings and the record that the action was brought by the plaintiff against two joint defendants and that a plea of set-off was filed by one. This is contrary to the rule. A debt to be set off must be mutual and between the parties to the record. Stuart v. Lott, 304 Ill. 170. There was no allegation in the affidavit of defense that the plaintiff was insolvent. The defendant, Colletta Ellsworth, was not entitled to the claim to set off, as the set-off was not one which was in favor of both defendants.

The Supreme Court of this state in the case of Priest v. Dodsworth, 235 Ill. 613, in its opinion said:

> "It is contended by defendants that the court erred in sustaining the demurrer to the third plea of J. R. Dodsworth. We think the plea clearly bad. It proposed to set off an individual demand of J. R. Dodsworth against the joint demand of the plaintiff against J. R. Dodsworth and R. C. Dodsworth. This is not permissible. Demands, to be the subject matter of set-off, must be mutual between all the parties to the action. (Dameier v. Mayor, 167 Ill. 547; Ryan v. Harger, 16 id. 28; 19 Ency. of Pl. & Pr. 757.)"

To the same effect see Dameier v. Mayor, 167 Ill. 547; Bevier v. Horn, 180 Ill. App. 547.

The court improperly admitted evidence of the set-off as it was not a defense mutual to both defendants.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND FRIEND, JJ. CONCUR.

only claimed as guarantor and could not, necessarily, be entitled to a judgment against the maintiff.

It appears from the pleadings and the record that the action was brought by the plaintiff against two joint defendants and that a plea of set-off was filed by one. This is contrary to the rule. A debt to be set off must be mutual and between the parties to the record. Stuart v. Loft, 204 Ill. 172. There was no allegation in the affidavit of defense that the plaintiff was insolvent. The defendant, Dollette Ellsworth, was not entitled to the claim to set off, as the set-off was not one which was in favor of both defendants.

The Supreme Court of this state in the case of Pickett v. Underwood, 242 Ill. 212, in its opinion said:

> "It is contended by defendants that the court erred in sustaining the demurrer to the third plea of d. c. Underwood. In this the plea clearly bad. It presumes to say all in individual capacity of d. c. Underwood against the joint account of the plaintiff against d. c. Underwood and d. c. Underwood. This is not permissible. Demurrer, to be the subject matter of set-off, must be mutual between all the parties to the action. (Hamilton v. Dexter, 167 Ill. 147; Ryan v. Hunter, 18 id. 99; 16 Amer. St. R. 127.)"

To the same effect was Hamilton v. Dexter, 167 Ill. 147; Pickett v. Hunter, 18 Ill. App. 227.

The court improperly admitted evidence of the set-off as it was not a defense mutual to both defendants.

For the reasons stated in this opinion the judgment of the municipal court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND MEYER, JJ., CONCUR.

34701

ADAM T. LEIB,
Appellee,
v.
LAMBRECHT CREAMERY, a Corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

261 I.A. 650

Opinion filed May 13, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an appeal by the defendant, Lambrecht Creamery, a Corporation, from a judgment obtained against it by the plaintiff, Leib, for damages growing out of a collision between the truck of the defendant company and the automobile owned and operated by the plaintiff.

From the evidence it appears that Leib was driving his car north on Mannheim Road and the truck of the defendant was proceeding in an easterly direction along Lake Street, two intersecting streets. Lake street is a state road and about 15 feet to the south on Mannheim Road was the sign, "Stop State Road". Plaintiff testified that he was proceeding slowly along Mannheim Road before approaching Lake street, the place where the collision occurred, and stopped to change gears. There appears to be some question as to whether it could be gathered from his answers as to whether he stopped or not, but a fair interpretation appears to show that he stopped just long enough to shift his gears. Plaintiff testified further that he did not see the approaching truck of the defendant.

Day, the driver of the defendant's truck, testified that he was proceeding over and along Lake street at about 30 miles an hour and that he saw the car of the plaintiff for the first time at about 100 feet south of Lake street, coming down an incline on

[illegible]

[illegible] T. [illegible],

Appellee,

v.

[illegible] COUNTY, a
Corporation,

Appellant.

[illegible] COURT

[illegible]

291 I.A. 650

Opinion filed May 13, 1931

Mr. PRESIDING JUSTICE [illegible] delivered the opinion of the court.

This is an appeal by the defendant, [illegible] County, a Corporation, from a judgment obtained against it by the plaintiff, [illegible], for [illegible] of a collision between the [illegible] of the defendant company and the [illegible] owned and operated by the plaintiff.

From the evidence it appears that [illegible] was driving his [illegible] on Washington road and the truck of the defendant was proceeding in an westerly direction along Lake street, the intersecting street. Lake street is a state road and about 18 feet to the south [illegible] Washington road was the sign, "Stop state road". Plaintiff testified that he was proceeding slowly along Washington road before approaching Lake street, the place where the collision occurred, and stopped in sharp gears. There appears to be some question as to whether it could be gathered from his answers as to whether he stopped or not, but a fair interpretation appears to make that he stopped long enough to shift his gears. Plaintiff testified further that he did not see the approaching truck of the defendant.

Mr. [illegible], the driver of the defendant's truck, testified that he was proceeding west and along Lake street at about 30 miles an hour and that he saw the car of the plaintiff for the first time at about 100 feet south of Lake street, coming down an incline on

Mannheim Road at a speed of about 40 miles an hour and that it increased its speed as it reached Lake street. His testimony is not corroborated by any other witness.

Two witnesses, school teachers, were riding in a car following that of the plaintiff and they testified that plaintiff was driving at about 15 miles an hour and going slowly before he reached Lake street, but they did not notice whether he stopped or not.

The jury returned a verdict in favor of the plaintiff and assessed his damages in the sum of $400, upon which verdict judgment was entered.

Counsel for the defendant contended that there was no proof of negligence on the part of the defendant and further that it was the duty of the plaintiff to stop at Lake street and that the driver of the defendant's truck had a right to presume that he would remain standing until defendant's truck passed. The evidence is conflicting as to whether or not plaintiff stopped at Lake street, and this was a question of fact for the jury.

A case very similar to the one at bar is that of Roth v. Fleck, 242 Ill. App. 396. In that case the plaintiff was driving south on Sheffield avenue and the defendant was driving west on Addison street. By an ordinance of the City of Chicago, Addison street was designated as a through traffic street and required vehicles approaching it along intersecting streets to stop before proceeding across. Plaintiff in that case testified that he stopped and looked but did not see defendant's automobile and was partly across the street when the accident occurred. The court in its opinion in that case said:

> "Counsel for the defendant contend that there is no proof of negligence on the part of the defendant. The determination of that question depends upon the question whether the testimony on behalf of the plaintiff or the testimony on behalf of the defendant is to be believed. One of the controlling facts in issue is whether the plaintiff stopped

Bloomfield had at a speed of about 40 miles an hour and that it increased its speed as it reached Lake Street. His testimony is not corroborated by any other witness.

Two witnesses, named Goodson, were riding in a car following that of the plaintiff and they testified that plaintiff was driving at about 15 miles an hour and going nicely before he reached Lake Street, but they did not notice whether he stopped or not.

The jury returned a verdict in favor of the plaintiff and assessed his damages in the sum of $400, upon which verdict judgment was entered.

Counsel for the defendant contended that there was no proof of negligence on the part of the defendant and further that it was the duty of the plaintiff to stop at Lake Street and that the driver of the defendant's truck had a right to presume that he would remain stopping until defendant's truck passed. The evidence is conflicting as to whether or not plaintiff stopped at Lake Street, and this was a question of fact for the jury.

A case very similar to the one at bar is that of Kuhn v. Ilgner, 248 Ill. 490, 494. In that case the plaintiff was driving south on Sheffield Avenue and the defendant was driving east on Addison Street. By an ordinance of the City of Chicago, Addison Street was designated as a through traffic street and required vehicles approaching it along intersecting streets to stop before proceeding across. Plaintiff in that case testified that he stopped and looked but did not see defendant's automobile and was partly across the street when the accident occurred. The court in its opinion in that case said:

> "Counsel for the defendant contend that there is no proof of negligence on the part of the defendant. The determination of that question depends upon the question whether the testimony on behalf of the plaintiff or the testimony on behalf of the defendant is to be believed. One of the controlling facts in issue is whether the plaintiff stopped

as he approached Addison Street. On this issue the evidence is conflicting. In this state of the evidence we do not think that we should disturb the verdict. The rule is a familiar one that 'where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, even though it may be against the apparent weight of the evidence, a reviewing court will not set it aside.' Carney v. Sheedy, [illegible], 295 Ill. 78, 83. To the same effect are the following cases. Illinois Cent. R. Co. v. Gillis, 68 Ill. 317, 319; Bradley v. Palmer, 197 Ill. 15, 89. It is hardly necessary to state that the finding of a court is entitled to the same weight and consideration as the verdict of a jury. Fisk v. Hopping, 169 Ill. 105, 108."

We are referred by counsel for defendant to Mantonya v. Wilbur Lumber Co., 251 Ill. App. 364, but in that case the court found from the evidence that the defendant's truck not only failed to stop before attempting to cross the paved road, but proceeded to cross at a high rate of speed. Moreover, numerous instructions were given which necessitated a reversal of the cause. The other cases cited are distinguishable.

The question of negligence is one upon which a jury is eminently fitted to pass and, where the verdict is sustained by the judgment of the trial court, it will not be reversed on appeal unless the verdict and judgment are manifestly against the weight of the evidence. The trial court and the jurors had an opportunity of hearing and observing the witnesses when testifying, which we do not have.

It is insisted that the trial court erred in permitting the introduction of the repair bill, showing the repairs to the automobile of the plaintiff after the accident. This court in the case of Roth v. Fleck, 242 Ill. App. 396, already cited, held that the repair bill was competent.

This court in the case of Gloyes v. Plaatke, 231 Ill. App. 183, in its opinion says:

"The evidence shows that the automobile was taken to a concern which was engaged in the business of repairing of automobiles; that plaintiff's car was then repaired by the garage company in the ordinary course of business; that the repairs made were those required as a result of the

Lane v. Johnson, 188 Ill. 436, 440.

In are referred by counsel for defendants to *Mathews v. Wilson Lumber Co.*, 221 Ill. 400. 404, but in that case the court found from the evidence that the defendant's truck had only failed to slow before attempting to cross the paved road, but proceeded to cross at a high rate of speed. Moreover, numerous instructions were given which emphasized a reversal of the cause. The error made clear was distinguishable.

The question of negligence in one upon which a jury is ordinarily filled in some cases, where the verdict is sustained by the judgment of the trial court, it will not be reversed on appeal unless the verdict and judgment are manifestly against the weight of the evidence. The trial court and the jurors had an opportunity of hearing and observing the witnesses when testifying, which we do not have.

It is insisted that the trial court erred in permitting the introduction of the repair bill, showing the repairs to the automobile of the plaintiff after the accident. This court in the case of *Kath v. Plank*, 302 Ill. App. 386, already cited, held that the repair bill was competent.

This court in the case of *Clover v. Plantz*, 241 Ill. App. 189, in its opinion says:

> "The evidence shows that the automobile was taken in a condition which was changed in the business of repairing it immediately that plaintiff's car was struck, evidenced by the repair bill. The ultimate source of business of business; that the repairs made are those ordinarily as a result of the injuries made by the defendant."

collision; that the garage company presented its bill for the repairs to plaintiff which plaintiff paid. In these circumstances we think what plaintiff paid for the repairs was sufficient to warrant the recovery by him of such sum without any further evidence, since nothing appeared to cast suspicion on the transaction between plaintiff and the garage company, and, therefore, it will be presumed that the charge made was reasonable. Travis v. Pierson, 43 Ill. App. 579; Peabody v. Lynch, 184 Ill. App. 78; Coyne v. Cleveland, C. C. & St. L. Ry. Co., 208 Ill. App. 425; Atchison v. Steamboat, 14 Mo. 63. To the same effect are Johnson v. Canfield-Swigart Co., 292 Ill. 101; Sears, Roebuck Co. v. Mears Slayton Lumber Co., 226 Ill. App. 287 (and cases there cited); Mudd v. Van Orden, 33 N. J. Eq. 143."

In the case at bar plaintiff testified that the whole side of his car was crushed, and the door and lights broken. The car was taken to Thomas T. Hoskins Company, whose business was that of repairing automobiles; that they checked over the parts of the car that were damaged, fixed the car up, and rendered a bill to plaintiff and that he paid it. There was no evidence on behalf of the defendant that the bill was unreasonable nor improper nor that there was any collusion between the plaintiff and the Hoskins Company. In accordance with the rule announced in Cloyes v. Plaatke, supra, there was sufficient evidence to justify the court in admitting the paid bill in evidence.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

[illegible]

In the case at bar plaintiff testified that the whole side of his car was crushed, and the door and lights broken. The car was taken to Thomas C. Boiling Company, whose business was that of repairing automobiles; that they checked over the parts of the car that were damaged, fixed the car up, and rendered a bill to plaintiff and that he paid it. There was no evidence on behalf of the defendant that the bill was unreasonable nor improper nor that there was any collusion between the plaintiff and the Boiling Company. In accordance with the rule announced in Flynn v. Liberty Ins. Co., there was sufficient evidence to justify the court in admitting the repair bill in evidence.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

WEBB and Wilson, JJ., concur.

34713

MARTIN ROSEN and MORRIS GERTLER,
Appellants,

v.

RUSSEL CLARK, JACOB MARK, A. H. SHATFORD, K. A. MEYERS, J. F. CLARK, JR., JAMES COKER, LUCIEN VOORHIES, DAN LASER & JOSEPH A. MEYER, JR., trading as JOHN F. CLARK & CO.,
Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

261 I.A. 650

Opinion filed May 13, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This was an action brought by Martin Rosen and Morris Gertler, jointly, to recover $2,866.75 from the defendants, Russel Clark, Jacob Mark, A. H. Shatford, K. A. Meyers, J. F. Clark, Jr., James Coker, Lucien Voorhies, Dan Laser & Joseph A. Meyer, Jr., trading as John F. Clark & Co. The cause was tried before the court without a jury, resulting in a finding in favor of the defendants and judgment upon the finding, from which judgment plaintiffs appeal to this court.

From the facts it appears that plaintiffs, Rosen and Gertler, had a joint account with the defendants, John F. Clark & Co. John F. Clark & Co. were brokers dealing in stocks. Rosen testified that on October 25, 1929, he was at the defendant's office and talked with a Mr. Kieferstein, who was an employee of the defendant, in regard to purchasing some stock and left a check for $500.00, which was to be credited to the joint account of the plaintiffs. The witness testified further that he discussed with Kieferstein the proposition of buying certain shares of Montgomery Ward & Co. stock for his account and, on the following day, October 26th, he went to the defendants' office and gave Mr. Kieferstein an order to buy 15 shares of Montgomery Ward & Co. stock. On Saturday, October 26th,

Opinion filed May 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This was an action brought by Martin Rosen (at matrix, Martin), jointly, to recover $1,000.00 from the defendants, Manuel Clark, Jacob Mark, A. E. Gartner, E. J. Meyers, L. L. Clark, Jr., James Doser, Andrew Fritzlen, Ben Lauer & Joseph A. Meyer, Jr., trading as John F. Clark & Co. The cause was tried before the court without a jury, resulting in a finding in favor of the defendants and judgment upon the finding, from which judgment plaintiffs appeal to this court.

From the facts it appears that plaintiffs, Rosen and Martin, had a joint account with the defendants, John F. Clark & Co. John F. Clark & Co. were brokers dealing in stocks. Rosen testified that on October 28, 1929, he was at the defendant's office and talked with a Mr. Kiefersteln, who was an employee of the defendant, in regard to purchasing some stock and left a check for $800.00, which was to be credited to the joint account of the plaintiffs. The witness testified further that he discussed with Kiefersteln the proposition of buying certain shares of Montgomery Ward & Co. stock for his account and, on the following day, October 28th, he went to the defendants' office and gave Mr. Kiefersteln an order to buy 15 shares of Montgomery Ward & Co. stock. On Saturday, October 28th,

he ascertained that the order had been executed and on Tuesday he found a telephone message from Mr. Kieferstein. Rosen stated he called Kieferstein on the 'phone and was asked for more margin and then found out that Kieferstein had purchased 50 shares of Montgomery Ward & Co. stock instead of 15 shares.

Plaintiff testified further that he refused to pay the defendants any additional money as a margin requirement to protect the account and that stocksdepreciated and the Montgomery Ward & Co. stock was sold together with certain other stock belonging to plaintiff, as a result of which there was a loss of $2,866.75.

Sol Klish, a witness on behalf of the plaintiff, testified that he was with Rosen at the office of the defendants at the time of the talk with Kieferstein and he heard Rosen order 15 shares of Montgomery Ward & Co. stock.

Kieferstein, on behalf of the defendants, testified that the order was for 50 shares and that he made out the order at the time in writing, which order was introduced in evidence and shows a written memorandum for 50 shares of Montgomery Ward & Co. charged to Gertler & Rosen.

The stock ledger account of the plaintiffs' carried on the books of the defendant company was introduced in evidence and shows a number of transactions during the year 1929, all of which are either in 100 or 50 share lots. The only question is whether or not the order was for 15 or 50 shares.

Plaintiffs argue that the required additional margin of $500 was not sufficient to cover 50 shares and indicated that the order was for only 15 shares. It appears, however, that there were other stocks held in the account which may have been sufficient to cover the margin requirements. Moreover, the memorandum of sale made at the time of the sale would clearly support defendants' theory of the case that the order was for 50 shares.

he asserted that the order had been executed and on Tuesday he found a telephone message from Mr. Lieberstein. Jones stated he called Lieberstein on the 'phone and was asked for more margin and this found out that Lieberstein had purchased 20 shares of Montgomery Ward & Co. stock instead of 10 shares.

Plaintiff testified further that he talked to any the defendants any additional money as a margin requirement to protect the account and that stocks depreciated and the Montgomery Ward & Co. stock was sold together with certain other stocks belonging to plaintiff, as a result of which there was a loss of $2,880.75.

Sol Klein, a witness on behalf of the plaintiff, testified that he was with Jones at the office of the defendants at the time of the talk with Lieberstein and he heard Jones order 10 shares of Montgomery Ward & Co. stock.

Lieberstein, on behalf of the defendants, testified that the order was for 20 shares and that he made out the order at the time in writing, which order was introduced in evidence and shows a written memorandum for 20 shares of Montgomery Ward & Co. bought to settle a loss.

The stock ledger account of the plaintiff, carried on the books of the defendant company was introduced in evidence and shows a number of transactions during the year 1929, all of which are either in 100 or 50 share lots. The only question is whether or not the order was for 10 or 20 shares.

Plaintiff argue that the required additional margin of $500 was not sufficient to cover 20 shares and indicated that the order was for only 10 shares. It appears, however, that there were other stocks held in the account which may have been sufficient to cover the margin requirements. Moreover, the memorandum of sale made at the time of the sale would clearly support defendants' theory of the case that the order was for 20 shares.

The court found that the plaintiffs had not proved their case by a preponderance of the evidence and we see no reason for disturbing the finding of the court. The court had the advantage of being able to observe the demeanor of the witnesses while upon the stand and was in a much better position to weigh their evidence than is a court of review.

It is insisted on behalf of the plaintiffs that the trial court erred in not granting plaintiffs a nonsuit. An examination of the record, however, discloses that no motion for a nonsuit was made. During the course of the argument counsel for the plaintiffs stated, "Still if your Honor feels that way I will take a nonsuit." This could hardly be held to be a motion for a nonsuit. It appears to have been dependent upon how the court felt about the matter. A motion of this character should not be equivocal and dependent upon some other fact or condition. If counsel for plaintiff had intended to take a nonsuit, it should have been done and not left dependent upon the feeling of the court. Even though the statement may have been considered as a motion nevertheless it was taken after the court had stated sufficient to apprise plaintiff as to what the finding of the court would be. Weiss, et al. v. Corn, 203 Ill. App. 261; Yudelson v. Winterberg, 185 Ill. App. 454.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

The court found that the plaintiffs had not proved their case by a preponderance of the evidence and we see no reason for disturbing the finding of the court. The court had the advantage of being able to observe the demeanor of the witnesses while upon the stand and was in a much better position to weigh their evidence than is a court of review.

It is insisted on behalf of the plaintiffs that the trial court erred in not granting plaintiffs a nonsuit. In consideration of the record, however, believes that no motion for a nonsuit was made. During the course of the argument counsel for the plaintiffs stated, "Still if your Honor feels that way I will take a nonsuit." This could hardly be held to be a motion for a nonsuit. It appears to have been dependent upon how the court felt about the matter. A motion of this character should not be equivocal and dependent upon some other fact or condition. If counsel for plaintiff had intended to take a nonsuit, it should have been done and not left dependent upon the feeling of the court. Even though the statement may have been considered as a motion nevertheless if was taken after the court had stated sufficient to apprise plaintiff as to what the finding of the court would be. Cohen, et al. v. Cohen, 201 Ill. App. 261; Yoakum v. Platzhoff, 108 Ill. App. 424.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

ESTES AND PRIMPS, JJ., CONCUR.

34451

ROBINSON REFRIGERATOR WORKS,
a Corporation,

Appellee,

v.

WEST END PINE BUILDING CORPORATION,
a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

261 I.A. 650

Opinion filed May 13, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

This cause is now before us on rehearing granted. On January 15, 1930, the Municipal Court of Chicago entered judgment by default against the defendant in the sum of $1982.15. Execution issued thereon January 22, 1930. March 6, 1930, which was about fifty days after the rendition of the judgment, defendant filed a petition seeking to have the judgment vacated, the affidavit of merits, which had been stricken, reinstated and the cause set down for hearing. The court overruled the petition and this appeal is prosecuted to reverse that judgment.

The petition, after briefly stating facts purporting to constitute a meritorious defense, alleges an agreement between counsel for the continuance of the case, as a result of which the same was reset from January 8, 1930, to January 15, 1930, and that on the latter date, without further notice to defendant, the court struck its affidavit of merits and entered the judgment appealed from.

The petition presented only two matters to the court; one was the meritorious defense claimed by defendant, and the other was the failure of plaintiff's counsel to notify defendant of the date to which the cause had been continued. More than thirty days having expired after the judgment was entered, the court manifestly had lost jurisdiction of the cause, except as provided in Section 409, Chapter 37, Illinois R. S., which provides:

Opinion filed May 13, 1931

MR. JUSTICE DAILEY delivered the opinion of the court.

This cause is now before us on rehearing granted, on January 13, 1930, the municipal court of Chicago entered judgment by default against the defendant in the sum of $1050.15. Execution issued thereon January 23, 1930. Since M. 1930, more than fifty days after the rendition of the judgment, defendant filed a petition seeking to have the judgment vacated, the affidavit of merit, which had been stricken, reinstated and the cause set down for hearing. The court overruled the petition and this appeal is prosecuted to reverse that judgment.

The petition, after briefly stating facts supporting to constitute a meritorious defense, alleges in substance that the malfeasance of the case, as a result of which the same was tried from January 2, 1930, to January 13, 1930, and that on the latter date, without further notice to defendant, the court given its affidavit of merits and entered the judgment appealed from.

The petition presented only two matters to the court; one was the motion defense claimed by defendant, and the other was the failure of plaintiff's counsel to notify defendant of the date to which the cause had been continued. More than thirty days having elapsed after the judgment was entered, the court manifestly had lost jurisdiction of the cause, except as provided in section 40, Chapter 37, Illinois R. S., which provides:

"If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by bill in equity, or by a petition to the Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; providing, however, that all errors in fact in the proceedings in such case, might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside in the manner provided by law for similar cases in the Circuit Court."

This statute designates two grounds upon which a judgment of the Municipal Court may be set aside or vacated after the expiration of thirty days: (1) where the petition sets forth grounds which would be sufficient to cause the same to be vacated, set aside or modified by bill in equity; and (2) where errors in fact appear in the proceeding which might have been corrected at common law by writ of error coram nobis.

With reference to the second ground the rule is well established in this state that the office of the writ of error coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact such as the death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian; or coverture, where the common law disability still exists; or insanity, it seems at the time of the trial; or a valid defense existing in the facts of the case but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake, these facts not appearing on the face of the record, and being such as if known in season, would have prevented the rendition and entry of the judgment questioned. (People v. Noonan, 278 Ill. 430). It is not contended in this proceeding that defendant's right to have the judgment set aside rests upon this provision of the statute.

Defendant's petition deals solely with matters which are contemplated under that portion of the statute affording relief

"If no option to waive, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified upon appeal or writ of error, or by bill in equity, or by a petition in the municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; provided, however, that all errors in fact in the proceedings in such case, right have been corrected by motion in the nature of a writ of error coram nobis or the manner provided by law for similar cases in the circuit court."

Illinois Civil Code Sec. 203

This statute designates the grounds upon which a judgment of the municipal court may be set aside or vacated after the expiration of thirty days: (1) where the petition sets forth grounds which would be sufficient to cause the case to be vacated, set aside or modified by bill in equity; and (2) where errors in fact appear in the proceeding which might have been corrected on issues joined by writ of error coram nobis.

With reference to the second ground the rule is well established in this state that the office of the writ of error coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact such as the death of either party pending the suit and before judgment thereon; or infancy, where the party was not properly represented by guardian; or coverture, where the common law disability still exists; or insanity, if seen at the time of the trial; or a valid defense existing in the facts of the case but which, without negligence on the part of the defendant, was not made, either through duress or fraud or unavoidable mistake, these facts not appearing on the face of the record, and being such as if known in season, would have prevented the rendition and entry of the judgment complained. (People v. Jackson, 324 Ill. 430). It is not contended in this proceeding that defendant's right to have the judgment set aside rests upon this provision of the statute.

Defendant's petition deals solely with matters which are contemplated under this provision of the statute allowing relief

where grounds for vacating the judgment would be sufficient by bill in equity. We believe, however, that the various contentions made with reference to the subject matter of the petition upon this ground may be effectually disposed of by the fact that after the judgment was entered and execution issued, defendant waited for nearly fifty days, and beyond the time within which the court still had jurisdiction of the cause under the foregoing section of the statute to vacate the same, and that no excuse or justification for the delay appears in the petition.

In addition to the grounds urged by the petition for setting aside the judgment, it is now contended for the first time that the Municipal Court lacked jurisidiction to enter the judgment. This contention is based on plaintiff's statement of claim which sets forth the contract sued on, then alleges that plaintiff filed in the office of the clerk of the Municipal Court its claim for a mechanic's lien on defendant's property, and prays for a judgment on the lien "as is by statute provided" for the sum of $1,982.15, together with interest thereon. Defendant asserts that the statement of claim shows on its face that this is a suit between the original contractor and the owner, to foreclose a lien, and not a proceeding under the mechanic's lien act, wherein the subcontractor's claim may be brought in an action at law in assumpsit jointly against the owner and the contractor, and that the judgment is therefore void for lack of jurisdiction of the subject matter.

This contention was not presented to the Municipal Court by defendant's petition nor was any question raised as to the sufficiency of the claim or the jurisdiction of the court to enter a judgment prior to the entry thereof. There is attached to plaintiff's statement a copy of the contract between the parties and the statement alleges that in pursuance of the contract plaintiff completed the work upon which there is due the sum of $1982.15. It is true that further

above grounds for vacating the judgment which we articulate by rule in simply. It appears, however, that the trial proceedings were with reference to the merits matter of the petition upon this ground may be effectually disposed of by the date upon after the judgment was entered and execution issued, defendant notified the merit fully date, and joined the time within which the court still had jurisdiction of the cause under the foregoing section of the statute to vacate the case, and thus no reason to justify the the delay appears in the petition.

In addition to the grounds urged by the petition for setting aside the judgment, it is now contended for the first time that the municipal court lacked jurisdiction to enter the judgment. This contention is based on plaintiff's statement of claim which sets forth the contract sued on, then alleges that plaintiff filed in the office of the clerk of the municipal court its claim for a mechanic's lien on defendant's property, and prays for a judgment on the lien "as is by statute provided" for the sum of $1,088.19, together with interest thereon. Defendant asserts that the statement of claim shows on its face that this is a suit between the original contractor and the owner, to foreclose a lien, and not a proceeding under the mechanic's lien act, wherein the subcontractor's claim may be brought in an action at law in assumpsit jointly against the owner and the contractor, and that the judgment is therefore void for lack of jurisdiction of the subject matter.

This contention was not presented to the municipal court by defendant's petition nor was any question raised as to the sufficiency of the claim or the jurisdiction of the court to enter a judgment under the entry thereof. There is attached to plaintiff's statement a copy of the contract between the parties and the statement alleges that in pursuance of the contract plaintiff furnished the sum which there is due of $1088.19. It is true that further

allegations are made with reference to the filing of a mechanic's lien for the same amount in the office of the clerk of the Circuit Court, and that the statement "prays for judgment on said mechanic's lien as is by statute provided, for the sum of $1982.15". However, if that portion of the statement with reference to the mechanic's lien be regarded as surplusage, the statement still sufficiently sets forth a cause of action in assumpsit, upon which the judgment may rest. Under the authorities, pleadings are to be construed against the pleader prior to the entry of judgment, but after judgment a different rule applies, and the court will construe the pleadings upon which the judgment rests most liberally in favor of the pleader. It was so held in Roumbos v. City of Chicago, 332 Ill. 70, and Smith v. Rutledge, 332 Ill. 150. Therefore, we are not disposed to agree with defendant's contention that the court lacked jurisdiction to enter the judgment, and the same will accordingly be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

allegations are made with reference to the filing of a mechanic's lien for the same amount in the office of the clerk of the circuit court, and that the statement "prays for judgment on said mechanic's lien as is by statute provided, for the sum of [illegible]". Further, if that portion of the statement with reference to the mechanic's lien be regarded as surplusage, the statement still sufficiently sets forth a cause of action to constitute, upon which the judgment may rest. Under the authorities, pleadings are to be construed against the pleader when in the form of judgment, but after judgment a different rule applies, and the court will construe the pleading upon which the judgment rests most liberally in favor of the pleader. It was so held in Dawson v. City of Chicago, 201 Ill. 70, and Lyle v. Patterson, 155 Ill. 180. Therefore, we are not disposed to agree with defendant's contention that the court lacked jurisdiction to enter the judgment, and the same will accordingly be affirmed.

AFFIRMED.

Filed: F.J. Van Zele, J. Dunne.

34451

ROBINSON REFRIGERATOR WORKS, a Corporation, Appellee, v. WEST END PINE BUILDING CORPORATION, a Corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

261 I.A. 650

Opinion filed March 11, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

On January 15, 1930, the Municipal Court of Chicago entered judgment by default against the defendant in the sum of $1982.15. Execution issued thereon January 22, 1930. March 6, 1930, which was about fifty days after the rendition of the judgment, defendant filed a petition seeking to have the judgment vacated, the affidavit of merits, which had been stricken, reinstated and the cause set down for hearing. The court overruled the petition and this appeal is prosecuted to reverse that judgment.

The petition, after briefly stating facts purporting to constitute a meritorious defense, alleges an agreement between counsel for the continuance of the cause, as a result of which the same was re-set from January 8, 1930 to January 15, 1930, and that on the latter date, without further notice to defendant, the court struck its affidavit of merits and entered the judgment appealed from. We believe that the various contentions made with reference to the subject matter of the petition are effectually disposed of by the fact that after the judgment was entered and execution issued, defendant waited for nearly fifty days and beyond the time within which the court still had jurisdiction of the cause under Section 409, Chapter 37, Illinois Revised Statutes, to vacate the judgment.

KONIKOW MANUFACTURING COMPANY, a Corporation, Appellee, v. BYRT AND FINE BUILDING CORPORATION, a Corporation, Appellant.	Appeal from Municipal Court of Chicago. Honorable, Judge presiding.

Opinion filed March 11, 1931

MR. JUSTICE HEALY delivered the opinion of the court.

On January 12, 1930, the Municipal Court of Chicago entered judgment by default against the defendant in the sum of $[illegible]. Thereafter issued January 22, 1930, which was, 1930, which was about fifty days after the rendition of the judgment, defendant filed a petition seeking to have the judgment vacated, the affidavit of merits, which had been stricken, reinstated and the cause set down for hearing. The court overruled the petition and this appeal is prosecuted to reverse that judgment.

The petition, after briefly stating facts purporting to constitute a meritorious defense, alleges an agreement between counsel for the continuance of the cause, as a result of which the case was re-set from January 8, 1930 to January 12, 1930, and that on the latter date, without further notice to defendant, the court struck its affidavit of merits and entered the judgment appealed from. We believe that the various contentions made with reference to the subject matter of the petition are effectually disposed of by the fact that after the judgment was entered and execution issued, defendant waited for nearly fifty days and beyond the time within which the court still had jurisdiction of the cause under Section 68, Chapter 37, Illinois Revised Statutes, to vacate the judgment.

The petition presented only two matters to the court; one was the meritorious defense claimed by defendant, and the other was the failure of plaintiff's counsel to notify defendant of the date to which the cause had been continued. Thirty days having expired after the judgment was entered, the court manifestly had lost jurisdiction of the cause except to correct such errors of fact in the proceeding as might have been corrected at common law by a writ of error coram nobis. (Sec. 409, Chap. 37, Ill. R. S.).

It is now urged by defendant for the first time that the Municipal Court lacked jurisdiction to enter the judgment. This contention is based on plaintiff's statement of claim, which sets out the contract sued on; then alleges that plaintiff filed in the office of the Clerk of the Municipal Court its claim for a mechanic's lien on defendant's property, and prays for a judgment on the lien "as is by statute provided", for the sum of $1982.15, together with interest thereon. Defendant argues that the statement of claim shows on its face that this is a suit between the original contractor and the owner to foreclose a lien and not a proceeding under the mechanic's lien act, wherein the sub-contractor's claim may be brought in an action at law in assumpsit jointly against the owner and the contractor, and that the judgment is therefore void for lack of jurisdiction of the subject matter. This contention was not presented to the Municipal Court by defendant's petition, and the question therefore arises whether the matter is properly before us.

Without passing upon the merits of the jurisdictional question raised, we concur in defendant's contention that a judgment rendered by a court having no jurisdiction to hear and determine a cause may be raised at any time. (Sheahan v. Madigan,

The petition presented only two matters to the court; one was the jurisdictional defense claimed by defendant, and the other was the failure of plaintiff's counsel to notify defendant of the date to which the cause had been continued. Thirty days having expired after the judgment was entered, the court manifestly had lost jurisdiction of the cause except to correct such errors of fact in the proceeding as might have been committed if caused by a mistake or error. (Lyon v. Ohio, 22 Ohio St. 488, Syl. 2.).

It is now urged by defendant for the first time that the municipal court lacked jurisdiction to enter the judgment. This contention is based on plaintiff's statement of claim, which sets out the contract and then alleges that plaintiff filed in the office of the clerk of the municipal court its claim for a mechanic's lien on defendant's property, and prays for a judgment on the lien "as is by statute provided", for the sum of $1382.18, together with interest thereon. Defendant argues that the statement of claim shows on its face that this is a suit between the original contractor and the owner to foreclose a lien and not a proceeding under the mechanic's lien act, wherein the sub-contractor's claim may be brought in an action at law in assumpsit jointly against the owner and the contractor, and that the judgment is therefore void for lack of jurisdiction of the subject matter. This contention was not presented to the municipal court by defendant's petition, and the question therefore arises whether the matter is properly before us.

Without passing upon the merits of the jurisdictional question raised, we concur in defendant's contention that a judgment rendered by a court having no jurisdiction to hear and determine a cause may be raised at any time. (Shenkan v. Hutchen,

275 Ill. 372). However the matter must be properly presented to the reviewing court. The only basis upon which the Municipal Court may consider a motion to vacate a judgment after the expiration of thirty days is under the provisions of Section 21 of the Municipal Court Act. (Sec. 409, Chap. 37, Ill. R. S.). It has frequently been held that motions of this character do not become a part of the record unless they are made so by a bill of exceptions, and although the Clerk may include the motion and petition in the transcript of record, they cannot be considered. (Patton v. Young, 233 Ill. App. 515; Freckles v. General Film Co., 189 Ill. App. 321; Domitski v. American Linseed Co., 221 Ill. 161.) In the case before us, although time was granted for filing the bill of exceptions, none was tendered or presented to the trial court to preserve the petition to vacate the judgment, nor any evidence that might have been heard by the court in considering the petition, nor the action of the court thereon. Consequently there is nothing properly before this court to furnish any basis for a conclusion adverse to the proceedings of the trial court. The judgment will therefore be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

372; III. 372). However the matter must be properly presented to the reviewing court. The only basis upon which the municipal court may consider a motion to vacate a judgment after the expiration of thirty days is under the provisions of section 71 of the Municipal Court Act. (Sec. 460, Chap. 37, III. R. S.). It has frequently been held that motions of this character do not become a part of the record unless they are made so by a bill of exceptions, and although the clerk may include the motion and petition in the transcript of record, they cannot be considered. (Patton v. Young, 332 Ill. App. 312; Pracilas v. General Life Co., 328 Ill. App. 111; Dunlavis v. Sterling Lumber Co., 332 Ill. 162.) In the case before us, although time was granted for filing the bill of exceptions, none was tendered or presented to the trial court to preserve the petition to vacate the judgment, nor any evidence that might have been heard by the court in considering the petition, nor the action of the court thereon. Consequently there is nothing properly before this court to furnish any basis for a conclusion adverse to the proceedings of the trial court. The judgment will therefore be affirmed.

AFFIRMED.

Taylor, P.J., Lee and Wolfe, J.J., concur.

34571

ARTHUR J. LEHMANN, a minor, by MARTHA LEHMANN, his mother and next friend,	APPEAL FROM
(Plaintiff) Appellee,	SUPERIOR COURT
v.	
CITY OF CHICAGO, a Municipal Corporation,	COOK COUNTY.
(Defendant) Appellant.	261 I.A. 650

Opinion filed May 13, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Arthur J. Lehmann, a minor, by Martha Lehmann, his mother and next friend, as plaintiff, brought suit against the City of Chicago in the Superior Court of Cook County, to recover damages for personal injuries, alleged to have been sustained by him as a result of a collision between an automobile in which he was riding on a public highway in Chicago, and a motor vehicle with three trailers attached thereto owned and operated by the defendant. Trial was had before the court and a jury, resulting in a verdict and judgment for plaintiff in the sum of $2,000, from which this appeal is prosecuted.

The declaration consists of five counts, to which the defendant pleaded not guilty. The first count sets forth the statutory notice to the defendant, and alleges that plaintiff is a minor eight years of age; that while riding in an automobile at or near No. 2278-2284 Elston Avenue, a public highway in Chicago, and while in the exercise of due care and caution for his own safety, he was injured by a certain motor vehicle and trailers attached thereto, possessed, operated and maintained by defendant; that by reason of said motor vehicle being carelessly, negligently, wrongfully and improperly maintained and operated by defendant, the same was caused to and did run upon and against the automobile in

ARTHUR L. LEHMANN, a minor, by MARTHA LEHMANN, his mother and next friend, (Plaintiff) appellee,	APPEAL FROM CHICAGO MUNICIPAL COURT.
v.	
CITY OF CHICAGO, a municipal corporation, (Defendant) appellant.	MR. JUSTICE FRANCIS DISSENTING.

Opinion filed May 13, 1931

MR. JUSTICE FRANCIS delivered the opinion of the court.

Arthur L. Lehmann, a minor, by Martha Lehmann, his mother and next friend, as plaintiff, brought suit against the City of Chicago in the Municipal Court of Cook County, to recover damages for personal injuries, alleged to have been sustained by him as a result of a collision between an automobile in which he was riding on a public highway in Chicago, and a motor vehicle with three installed stationary tractors owned and operated by the defendant. Trial was had before the court and a jury, resulting in a verdict and judgment for plaintiff in the sum of $2,000, from which this appeal is prosecuted.

The declaration consists of five counts, to which the defendant pleaded not guilty. The first count sets forth the statutory notice to the defendant, and alleges that plaintiff is a minor eight years of age; that while riding in an automobile at or near No. 3270-3284 Elston Avenue, a public highway in Chicago, and while in the exercise of due care and caution for his own safety, he was injured by a certain motor vehicle and tractors attached thereto, possessed, operated and maintained by defendant; that by reason of said motor vehicle being carelessly, negligently, wrongfully and improperly maintained and operated by defendant, the same was caused to and did run upon and against the automobile in

which plaintiff was riding, resulting in his injuries. The second count alleges the negligence of the defendant in the operation of its said motor vehicle in that it failed to blow the horn or give some warning of its approach to the automobile in which plaintiff was riding, by reason whereof the collision ensued. The third count alleges excessive speed on the part of defendant, contrary to the statute. The fourth count alleges that defendant suddenly veered to the left of the north bound part of the roadway without any warning on its part, and the fifth count charges that the driver of defendant's motor truck was in an intoxicated condition while operating same, as a result of which the said truck collided with the automobile in which plaintiff was riding.

Briefly stated the facts disclose that plaintiff was a passenger in a Dodge sedan, proceeding in a southeasterly direction on Elston Avenue at a speed of about twenty or twenty-five miles per hour; that Edwin Johannes was driving the car with his wife, Harriet Johannes, sitting in the front seat; that plaintiff sat at the extreme left in the rear seat, immediately back of the driver next to his mother, Martha Lehmann, and that Walter Johannes sat at the extreme right in the rear seat, holding Ruth Lehmann, a child, on his lap; that it was a clear, dry, sunny day; that the Dodge sedan was proceeding partly on the south bound street car tracks along Elston Avenue; that defendant's truck with three trailers attached thereto was travelling on the north bound track, and suddenly swerved to the left as it approached the Dodge sedan, striking it right in the center, and that it kept pushing the Dodge sedan right up on the curb and against another car parked on the grass plot west of the curb.

It is contended on behalf of the defendant, (1) that there is no evidence in the record showing negligence on the part of the defendant; and (2) that the verdict and judgment are mani-

which plaintiff was riding, resulting in his injuries. The second count alleges the negligence of the defendant in the operation of its said motor vehicle in that it failed to blow the horn or give some warning of its approach to the automobile in which plaintiff was riding, by reason whereof the collision ensued. The third count alleges excessive speed on the part of defendant, contrary to the statute. The fourth count alleges that defendant suddenly veered to the left of the north bound part of the roadway without any warning on its part, and the fifth count charges that the driver of defendant's motor truck was in an intoxicated condition while operating same, as a result of which the side frame collided with the automobile in which plaintiff was riding.

Briefly stated the facts disclose that plaintiff was a passenger in a Dodge sedan, proceeding in a southwesterly direction on Elston Avenue at a speed of about twenty or twenty-five miles per hour; that Edwin Johnson was driving the car with his wife, Bertiet Johnson, sitting in the front seat; that plaintiff sat to the extreme left in the rear seat, immediately back of the driver next to his mother, Martha Johnson, and that Walter Johnson sat at the extreme right in the rear seat, holding Ruth Johnson, a child, on his lap; that it was a clear, day, sunny day; that the Dodge sedan was traveling partly on the south bound street car tracks along Elston Avenue; that defendant's truck with three trailers attached thereto was travelling on the north bound track, and suddenly veered to the left as it approached the Dodge sedan, striking it right in the center, and that it knocked the Dodge sedan right up on the sidewalk and against another car parked in the track that was at the curb.

It is contended on behalf of the defendant, (1) that there is no evidence in the record showing negligence on the part of the defendant; and (2) that the verdict and judgment are meri-

festly excessive and out of all proportion to the injuries alleged to have been sustained by plaintiff.

It seems to be conceded that the collision was caused by the sudden turn to the left of defendant's truck, as a result of which it struck the Dodge car, and plaintiff contends that this was the proximate cause of the accident. Defendant, however, contends that a Ford car, suddenly passing the truck on the right and proceeding in the same direction at considerable speed, struck the left front wheel of defendant's truck and deflected its course to the left just as the Dodge automobile was passing in the opposite direction in the south lane of traffic so as to cause the collision. Two witnesses called by defendant, Bartschmidt, the driver of the truck, and Hanson, his helper, testified to this effect.

Hanson stated that he was standing on the running board watching the trailers and as the Ford car came by had to jump up in the cab to avoid being struck. He then related the manner in which the left front wheel of the Ford caught the right front wheel of the truck and "threw us over on one side". He further testified that the truck weighed approximately eight ton and each of the three trailers about 5600 pounds.

Bartschmidt testified that he had been a chauffeur for the city for nine years; that there was a governor on the motor limiting the speed thereof to ten or eleven miles an hour; that as they travelled in a northerly direction on Elston Avenue his helper suddenly jumped in along side of him, and as he did so a Ford coupe caught the front wheel of the truck and "turned me over to the east side track" in which the Dodge car was coming from the north and that he hit the Dodge car just about in the center.

William Kaplan testified on behalf of plaintiff that he followed behind the Johannes car along Elston Avenue, about 100 to 150 feet in the rear, and contemplated passing the Dodge car just

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Hanson stated that he was sitting on the running board assisting the driver and as the Ford car came by had to jump to in the cab to avoid being struck. He then related the manner in which the left front wheel of the Ford caught the right front wheel of the truck and "threw us over on one side". He further testified that the truck weighed approximately eight ton and each of the three trailers about 3000 pounds.

Bartschmidt testified that he had been a chauffeur for the city for nine years; that there was a crossover on the main limiting the speed thereof to ten or eleven miles an hour; that as they travelled in a northerly direction on Clifton Avenue his helper suddenly jumped in along side of him, and as he did so a Ford coupe caught the front wheel of the truck and "turned me over to the east side truck" in which the Dodge car was coming from the north and that he hit the Dodge car just about in the center.

William Kaplan testified on behalf of plaintiff that he followed behind the Johnson car along Elston Avenue, about 100 to 150 feet in the rear, and contemplated passing the Dodge car just

as the collision occurred; that he did not remember seeing the Ford testified to by defendant's witnesses nor any other car except the Dodge and defendant's truck.

Edwin Johannes, the driver of the automobile in which the plaintiff was riding, testified that he first observed the truck about 100 to 150 feet away, travelling at approximately the same speed as his automobile; that when he got within five feet thereof, without any warning, it suddenly swerved over and struck his car right in the center and kept on pushing it right toward the curb and against another car parked near by; that the Dodge came to a stop on the sidewalk with the Mack truck right up against it; that the truck and trailers when they came to a standstill were strung across the street with the truck facing west; that he did not see the Ford testified to by defendant's witnesses.

Harriet Johannes' testimony was substantially the same as that of her husband, with reference to the manner in which the accident occurred. She further testified that the driver of the truck came to her after the collision and asked her whether she was hurt; that she smelled liquor on his breath and he appeared to be somewhat intoxicated.

It appears from the record that counsel for defendant in his opening statement to the jury stated that the Ford car referred to was driven by one Colvis Skinner and another young man who was with him, and Hanson testified that he took the names of the occupants of the car. Neither of these witnesses was produced upon the trial and no explanation was made of their absence. This fact, coupled with the improbability that a Ford coupe weighing less than a ton could swerve a motor train weighing over fifteen ton sufficiently out of its course to turn it west when it was going northwest, evidently led the jury to the conclusion that the proximate cause of the accident was the negligence of defendant's driver rather than

as the collision occurred; that he did not remember seeing the truck testified to by defendant's witnesses nor any other car except the Dodge and defendant's truck.

Edwin Johnson, the driver of the automobile in which the plaintiff was riding, testified that he first observed the truck about 100 to 150 feet away, travelling at approximately the same speed as his automobile; that when he was within five feet thereof, without any warning, it suddenly swerved over and across his car right in the center and half on pavement; it right toward the curb and against another car parked near by; that the Dodge came to a stop on the sidewalk with the front wheel right up against it; that the truck and trailer when they came to a standstill were strung across the street; with the truck facing west; that he did not see the truck testified to by defendant's witnesses.

Harvey Johnson, testimony was substantially the same as that of his brother, with reference to the manner in which the accident occurred. The further testified that the driver of the truck came to his after the collision and asked for whether she was hurt; that she smelled liquor on his breath and he appeared to be somewhat intoxicated.

It appears from the record that counsel for defendant in his closing statement to the jury stated that the load was referred to was driven by one Doris Skinner and another young man who was with him, and Hanson testified that he took the names of the occupants of the car. Neither of these witnesses was produced upon the trial and no explanation was made of their absence. This fact, coupled with the improbability that a load couple weighing less than a ton would cause a motor truck weighing over fifteen ton sufficiently out of its course to turn it west when it was going northwest, evidently led the jury to the conclusion that the proximate cause of the accident was the negligence of defendant's driver rather than

the deflection of the truck by the Ford car. It was held in Mannen v. Norris, 338 Ill. 322, that:

> "If the testimony of a witness is contrary to the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief, or if facts stated by the witness demonstrate the falsity of the testimony, the court is not bound to believe him."

The jury heard the witnesses and had an opportunity to determine their credibility and we are not disposed to disturb the verdict as being contrary to the manifest weight of the evidence.

With reference to the injuries, it appears from the record that plaintiff sustained injuries to his ribs, dorsal spine and pelvis. Plaintiff contends that he sustained a fracture of the illium, a portion of the pelvis. This is denied by defendants. It appears that two X-ray films were introduced in evidence. They were not certified to this court for our inspection, however, and where the record shows the introduction of evidence which does not appear in the bill of exceptions, we must presume that the same tended to sustain the verdict. It was so held in People v. Niehoff, 266 Ill. 103, and Mehfuss v. Hill, 243 Ill. 140.

Martha Lehman, plaintiff's mother, testified that after the accident Arthur was taken to the North Avenue Hospital where they placed him in a cast in bed; that he remained at the hospital for a week and was then taken home in a cab, where he remained another two weeks before the cast was removed; that subsequent to the removal of the cast he had to stay in bed for four weeks, being unable to walk; that thereafter he was able to sit up in a chair for another four weeks before he was able to walk; that he was thus incapacitated for more than two months. She testified further that before the accident Arthur was well and strong, and had never been injured before, but that subsequent thereto she noticed that he "kind of drags one foot", and "when the weather changes he seems to become exhausted."

the deflection of the truck by the road car. It was held in Kennedy v. Hartle, 325 Ill. 382, that:

> "If the testimony of a witness is contrary to the laws of nature or obviously human experience, so as to be incredible and beyond the limits of human belief, or if from stated by the witness demonstrates the reality of the testimony, the court is not bound to believe him."

The jury heard the witnesses and had an opportunity to determine their credibility and we are not disposed to disturb the verdict as being contrary to the manifest weight of the evidence.

With reference to the injuries, it appears from the record that plaintiff sustained injuries to his ribs, dorsal spine and pelvis. Plaintiff contends that he sustained a fracture of the ilium, a portion of the pelvis. This is denied by defendants. It appears that two X-ray films were introduced in evidence. They were not certified to this court for our inspection, however, and where the record shows the introduction of evidence which does not appear in the bill of exceptions, we must presume that the case tended to sustain the verdict. It was so held in Frogel v. Blumell, 344 Ill. 105, and Perkins v. Hill, 323 Ill. 140.

Dr. Ethel Johnson, plaintiff's mother, testified that after the accident Arthur was taken to the North Avenue Hospital where they placed him in a cast in bed; that he remained at the hospital for a week and was then taken home in a cab, where he remained another two weeks before the cast was removed; that subsequent to the removal of the cast he had to stay in bed for four weeks, being unable to walk; that thereafter he was able to sit up in a chair for another four weeks before he was able to walk; that he was thus incapacitated for more than two months. She testified further that before the accident Arthur was well and strong, and had never been injured before, but that subsequent thereto she noticed that he "kind of drags one foot", and "when the weather changes he seems to become exhausted."

There is no doubt from the evidence that plaintiff was severely injured and in view of the testimony we do not regard the verdict of $2,000 as being excessive.

For the reasons stated the verdict of the trial court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

There is no doubt from the evidence that quarrelly was severely injured and in view of the testimony we do not regard the verdict of $1,500 as being excessive.

For the reasons stated the verdict of the trial court will be affirmed.

AFFIRMED.

ELLIOT, C.J. AND DOBSON, J. CONCUR.

34581

WILLIAM H. MC FADDEN,
Appellant,
v.
IN RE ESTATE OF KATHERINE E. SWIFT, Deceased,
Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

Opinion filed May 13, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

William H. McFadden filed his claim in the Probate Court of Cook County for board, room and personal services of attendant rendered to Katherine E. Swift, deceased, from February 26, 1923 to February 6, 1927, being 202 weeks at the weekly rate of $30, making a total of $6060. On trial before the Probate Court the claim was disallowed. Thereupon the claimant appealed to the Circuit Court of Cook County where the cause was tried de novo before the court and a jury, upon stipulation of the parties that the transcript of the testimony taken in the Probate Court should be used as testimony in the Circuit Court. At the conclusion of all the evidence the court directed a verdict in favor of defendant and entered judgment, from which this appeal is prosecuted.

No attempt was made by claimant to show that any personal service was rendered to the deceased, as alleged in the statement of claim, nor is there any reliance upon an express contract between the parties. The claim is founded upon an implied contract arising from the relationship of the parties and the fact that deceased resided in claimant's household for a period of approximately three years. To support his claim evidence was offered on behalf of claimant to prove that he and the deceased were not blood relations; that deceased lived in his home for the stated period, and that the reasonable value of her board and room was $30 per week. All of these facts are readily admitted to be true by defendant, and it is

Opinion filed May 13, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

William H. Wordsdon filed his claim in the Probate Court of Cook County for board, room and personal services of attendant rendered to Elizabeth E. Swift, deceased, from February 26, 1922 to February 8, 1927, being $22 weeks at the weekly rate of $30, making a total of $6000. On trial before the Probate Court the claim was disallowed. Thereupon the claimant appealed to the Circuit Court of Cook County where the cause was tried de novo before the court and a jury, upon stipulation of the parties that the transcript of the testimony taken in the Probate Court should be used as testimony in the Circuit Court. At the conclusion of all the evidence the court directed a verdict in favor of defendant and entered judgment, from which this appeal is prosecuted.

No attempt was made by claimant to show that any personal service was rendered to the deceased, as alleged in the statement of claim, nor is there any reliance upon an express contract between the parties. The claim is founded upon an implied contract arising from the relationship of the parties and the fact that deceased resided in claimant's household for a period of approximately three years. To support his claim evidence was offered on behalf of claimant to prove that he and the deceased were not blood relations; that deceased lived in his home for the stated period, and that the reasonable value of her board and room was $30 per week. All of these facts are readily admitted to be true by defendant, and it is

conceded that from the proof thus made there arises an implied contract for services between the parties and a presumption of an agreement on the part of the deceased to pay the reasonable value of such services. However, this presumption is a mere legal conclusion arising from the relationship of the parties and the attendant circumstances, and may be rebutted by other evidence. (In re Est. of Dedmore, 267 Ill. App. 519; Seger v. Robinson-Nash Co., 340 Ill. 81.)

To rebut the presumption thus raised, defendant proved by competent witnesses that while Mrs. Swift lived in the McFadden household, she regularly paid $7.50 each week toward the maid's salary of $15, purchased groceries and supplies for use in the household, waited on the table, helped wash dishes and otherwise assisted in the work of the house. These facts likewise are uncontradicted.

In rebuttal claimant offered the testimony of John W. Woods, who stated that while McFadden was absent from the city in September, 1926, Mrs. Swift came over to McFadden's place of business to get some money from the witness, who was there employed, with which to run the household; that in the course of the conversation Woods said to her, "that is a pretty expensive flat over there, it costs a lot of money to run it", to which Mrs. Swift replied,"yes, it ain't costing me anything now, but I am going to take care of it later on."

It thus appears that the essential facts of the case are uncontradicted. The parties proceeded upon entirely different theories. Claimant relied on an implied contract. To overcome the presumption raised by claimant's evidence, defendant proved that the deceased paid her share of the household expenses under a cooperative plan. This evidence was not offered to show payment or part payment under claimant's theory; it was offered to rebut the

evidence that from the proof that such there exists an implied contract for services between the parties and a presumption of an agreement on the part of the deceased to pay the reasonable value of such services. Lastly, this presumption is a mere legal conclusion arising from the relationship of the parties and the attendant circumstances, and may be rebutted by other evidence. (In re Ind. of Jaeger, 247 Ill. App. 518; Lyons v. Delaney, 245 Ill. 81.)

To rebut the presumption thus raised, defendant proved by competent witnesses that while Mrs. Swift lived in the defendant household, she regularly paid $7.50 each week toward the maid's salary of $18, purchased groceries and supplies for use in the household, voted as the wife, helped with dishes and otherwise assisted in the work of the home. There were likewise no wages included.

In rebuttal claimant offered the testimony of John G. Tuck, who stated that with interests are clear from the city in September, 1929, Mrs. Swift came over to Defendant's place of business to get some money from the witness, who was there employed, with which to run the household; that in the course of the conversation Goodman said to her, "that is a pretty expensive flat over there, it costs a lot of money to run it", to which Mrs. Swift replied, "yes, it sure's costing me anything no, but I am going to take care of it later on."

It thus appears that the essential facts of the case are uncontradicted. The parties presented upon entirely different theories. Claimant relied on an implied contract. To overcome the presumption raised by claimant's evidence, defendant proved that the deceased paid her share of the household expenses under a cooperative plan. This evidence was not offered to show payment or part payment under claimant's theory; it was offered to rebut the

presumption of an implied contract and to prove an entirely different arrangement between the parties, under which Mrs. Swift entirely acquitted her obligation to claimant. Since the defendant admitted the facts upon which claimant's case is founded and made proof of its defense by evidence that is uncontradicted, no question of fact was left for the jury's consideration, unless it can be said that Woods' rebuttal evidence raised a question of fact. As to this, we are of the opinion that Woods' testimony does not tend to support claimant's position. Loose expressions such as his, attributed to the deceased, and indicative of the terms of a contract, are an insufficient basis for submission to a jury from which to find that such a contract in fact existed. (Smith v. Birdsall, 106 Ill. App. 264, citing Ulrich v. Arnold, 120 Pa. St. 178; Collar v. Patterson, 137 Ill. 403.)

As we view the case, the presumption raised by the relationship of the parties was a mere legal conclusion, which could not be treated as evidence nor weighed in the scale against evidence, and that as soon as defendant submitted its defense based upon facts that are uncontradicted, and entirely inconsistent with claimant's theory of an implied contract, the presumption of an agreement between the parties vanished entirely. (Osborne v. Osborne 325 Ill. 229; Weber v. Robinson-Nash Co., supra; Lohr v. H. Barkman Cartage Co. 335 Ill. 335.)

Claimant thus failed to support its claim upon the theory of an implied contract, and there being no contention made that an express contract existed between the parties and no proof in the record to sustain such a claim, we believe the court properly instructed the jury as a matter of law to find for the defendant.

For the reasons stated the judgment of the Circuit Court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

presumption of an implied contract and to prove an entirely different arrangement between the parties, under which the, said entirely acquitted her obligation to claimant. Since the contract admitted the facts upon which claimant's case is founded and made proof of its defense by evidence that is uncontradicted, in question of fact was left for the jury's consideration, unless it can be said that moore's repeated evidence raised a question of fact. As to this, we are of the opinion that moore' testimony does not tend to support claimant's position. Upon expressions such as his, attributed to the deceased, and indicative of the terms of a contract, are so inconclusive basis for submission to a jury from which to find that such a contract in fact existed. (Smith v. Stockwell, 108 Ill. App. 384, citing Kimball v. Kimball, 130 Ill. 57; Collier v. Patterson, 137 Ill. 400.)

As we view the case, the presumption raised by the relationship of the parties was a mere legal conclusion, which could not be treated as evidence nor weighed in the scale against evidence, and that as soon as defendant submitted its defense based upon facts that are uncontradicted, and entirely inconsistent with claimant's theory of an implied contract, the presumption of an agreement between the parties vanished entirely. (Osborne v. Durham 208 Ill. 304; Sauer v. Goldsmith Bank Co., Auditt Lodge v. I. Brunswick Corporation Co. 216 Ill. 299.)

Claimant thus failed to support its claim upon the theory of an implied contract, and there being no contention made that an express contract existed between the parties and no proof in the record to sustain such a claim, we believe the court properly instructed the jury as a matter of law to find for the defendant.

For the reasons stated the judgment of the Circuit Court will be affirmed.

AFFIRMED.

FILED: 5-4. 1940. G. GORMAN.

34611

SAM PAPAS and ANGELOS RENTAS, doing business as ROYAL RESTAURANT, (Complainants) Appellees,	)	APPEAL FROM CIRCUIT COURT
v.	)	COOK COUNTY.
JAMES STASINOS and NICHOLAS STASINOS, (Defendants) Appellants.	)	

Opinion filed May 13, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Sam Papas and Angelos Rentas conducting a restaurant in the City of Chicago under the name of Royal Restaurant, filed their bill of complaint in the Circuit Court of Cook County, subsequently amended, alleging that they were tenants of James Stasinos under a written indenture of lease expiring on September 30, 1934, and containing the following provision:

> "Lessor agrees not to rent any other store in this building for restaurant purposes or light luncheons."

The amended bill alleged that Nicholas Stasinos and Arthur Spaneles, as tenants of James Stasinos in the same building as that occupied by complainants, were conducting a confectionery store known as "Keystone Candies, Ice Cream", in which they were selling sandwiches, pie and other food and light lunches in connection with their business, and prayed for an injunction restraining the defendants from violating the foregoing covenant in said lease.

Answers were filed to the amended bill, and the cause referred to a master in chancery, who found that Nicholas Stasinos, a brother of James Stasinos, and Arthur Spaneles were the owners of the restaurant and light luncheon business complained of, and recommended that a decree be entered restraining them from conducting said business, and that James Stasinos be restrained until September 30, 1934, or so long as complainants or their assigns should remain

Opinion filed May 13, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

The ferns and angular Bertan conducting a restaurant in the city of Chicago under the name of Royal Restaurant, filed their bill of complaint in the circuit court of Cook County, subsequently amended, alleging that they were tenants of James Stanione under a written indenture of lease covering on September 20, 1924, and containing the following provision:

'Lessor agrees not to rent any other store in this building for restaurant purposes or light lunchroom.'

The amended bill alleged that Nicholas Stanione and arthur Spanione, as owners of these premises in the same building as that occupied by complainants, were conducting a self-service store known as "Keystone Candies, Ice Cream", in which they were selling candy, pie and other food and light lunches in competition with their business, and prayed for an injunction restraining the defendants from violating the foregoing covenant in said lease.

Answers were filed to the amended bill, and the cause referred to a master in chancery, who found that Nicholas Stanione, a brother of James Stanione, and Arthur Spanione were the owners of the restaurant and light lunchroom business complained of, and recommended that a decree be entered restraining them from conducting said business, and that James Stanione be restrained until September 20, 1924, or so long as complainants or their assigns should remain

tenants in possession of part of said building under the indenture of lease mentioned in the amended bill of complaint, from renting any part of the building to any person, firm or corporation for use as a light luncheon or restaurant business. The court approved the master's report and entered a decree on December 18, 1929, granting a permanent injunction.

On February 25, 1930, complainants filed a petition for a rule on James Stasinos and Nicholas Stasinos to show cause why they should not be punished for contempt of court for violation of the decree entered by the chancellor, alleging that the injunction theretofore issued had been violated by the sale of lunches on the premises of Nicholas Stasinos and Arthur Spaneles. On the return day of the rule James Stasinos and Nicholas Stasinos filed their joint answers averring that Nicholas Stasinos and Arthur Spaneles had sold, assigned and transferred their business to James Stasinos, and that Nicholas Stasinos was then an employee of James Stasinos. When the petition for the rule and the answers thereto came on for hearing, no counter affidavits were filed and no testimony was heard before the chancellor, who upon consideration of the petition and answers and statements made by counsel, entered the following order:

> "It is therefore ordered by this court that the said defendants, James Stasinos and Nicholas Stasinos, comply with the said decree aforesaid and cease all violation thereof and stop the conduct of the light luncheon and restaurant business in the store at the southeast corner of Austin Avenue and West North avenue, Chicago, Illinois, within two days."

from which an appeal is prosecuted to this court.

Counsel by their briefs have raised numerous questions of law with reference to the propriety of the court's order, based upon the validity of the covenant contained in the lease and findings of the decretal order and they seek to have us pass upon the merits of these contentions.

injuries in connection of part of said building under the jurisdiction of lessee mentioned in the amended bill of complaint, from erecting any part of the building in any manner, film or representation for use as a light theatre or instructor business. The court sustained the master's report and entered a decree on December 12, 1922, granting a permanent injunction.

On January 12, 1923, respondents filed a petition for a rule on James Stanlone and Nicholas Stanlone to show cause why they should not be punished for contempt of court for violation of the decree entered by the chancellor, alleging that the injunction theretofore issued had been violated by the sale of tickets on the premises of Nicholas Stanlone and other persons. On the return day of the rule James Stanlone and Nicholas Stanlone filed their joint answers averring that Nicholas Stanlone and other persons had sold, assigned and transferred their business to James Stanlone, and that Nicholas Stanlone was then an employee of James Stanlone. When the petition for the rule and the answers thereto came on for hearing, no counter affidavits were filed and no testimony was heard before the chancellor, who upon consideration of the petition and answers and statements made by counsel, entered the following order:

"It is stipulated evidence in this court that the said defendants, James Stanlone and Nicholas Stanlone, simply rig the sell decree otherwise and never sell violation thereof and also the conduct of the light business and performance business in the store at the southwest corner of Joslin avenue and East 54th street, Dallas, Illinois, within the days."

Para which an appeal is prosecuted in this court.

Counsel by their briefs have raised numerous questions of law with reference to the propriety of the court's order, based upon the validity of the contempt contained in the issue and finding of the decretal order and they seek to have us pass upon the merits of these contentions.

Inasmuch, however, as the order holding the defendants in contempt of court and directing them to cease violating the injunction within two days imposed no fine nor contained any provision for committment of either of the defendants to jail by reason of the contempt which the chancellor found to exist, we are of the opinion that the appeal should be dismissed.

An order lacking the element of directing punishment either by fine or imprisonment is merely interlocutory, and is not a final order or judgment of committment. (McEwen v. McEwen, 55 Ill. App. 340. Sercomb v. Catlin, 25 Ill. App. 194.) The whole force of the chancellor's order was to direct defendants to cease all violation of the injunction theretofore entered, and to stop the conduct of the restaurant conducted by them, within two days thereafter. It provides for no punishment of the defendants either by fine or imprisonment, and is therefore not a final and appealable order.

For the reasons stated the appeal will be dismissed.

APPEAL DISMISSED.

WILSON, P.J. AND HEBEL, J. CONCUR.

Present, however, on the order holding the defendants in contempt of court and directing them to cease violating the injunction which has been issued so that our decisions may protect for enforcement of either of the defendants to jail by reason of the contempt which the defendants fought to enjoy, so are of the opinion that the appeal should be dismissed.

An order holding the officers of directing punishment either by fine or imprisonment is merely interlocutory, and is not a final order or judgment of sentence. Ex parte Gilson v. Gilson, 22 Ill. App. 260. Ex parte Gilson, 22 Ill. App. 184.) The whole theme of the chancellor's order was to direct defendants to cease all violations of the injunction theretofore entered, and to keep the conduct of the restraining contained by them, within the bounds it prescribed for the protection of the defendants at the defendants at law or in equity, and is therefore not a final and appealable order.

For the foregoing reasons the appeal will be dismissed.

APPEAL DISMISSED.

WILSON, P.J. AND KEENE, J. CONCUR.

34508

DONALD S. McWILLIAMS, et al,
Defendants in Error,
v.
THEODORE W. MAY, et al,
Plaintiffs in Error.

WRIT OF ERROR TO
THE CIRCUIT COURT
OF COOK COUNTY.

261 I.A. 651

Opinion filed May 13, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This is a writ of error prosecuted by the defendants (plaintiffs in error), Theodore W. May and Bell R. May, to review the decree of the Circuit Court of Cook County entered in the foreclosure proceeding instituted by Donald S. McWilliams and Hugh L. McWilliams, Trustees, complainants (defendants in error) against Theodore W. May and certain other defendants.

It appears from the record that on March 2, 1928, the said defendants, Theodore W. May and Bell R. May, owned the property known as 4620-22 Drexel Boulevard, Chicago, Illinois; that the premises were improved with a 17 room 3-story brick and stone residence, and a substantial 2-story stable-garage-apartment on the rear of the land, which improvements originally cost $45,000; that the house had been remodeled into a 3-apartment building, the first floor renting for $150. per month; the second floor for $125. per month, and the third floor for $115. per month; that the 3-car garage and the apartment both, rented for $67.50 per month; that Theodore W. May, one of the defendants, valued the land at $800 a front foot, or a total of $48,000, and the improvements at $15,000.

On the date heretofore referred to, the said defendants, Theodore W. May and Bell R. May, executed a $20,000, 6 per cent first mortgage on the premises, due on March 2, 1931; and thereafter on May 1, 1928, they executed a $10,000, 6 per cent second mortgage on the same premises.

Opinion filed May 13, 1931

Mr. JUSTICE BURKE delivered the opinion of the court.

This is a writ of error prosecuted by the defendants (plaintiffs in error). Theodore E. Ray and Nell R. Ray, to review the decree of the Circuit Court of Cook County entered in the foreclosure proceeding instituted by Harold L. Williams and Hugh L. Williams, Trustees, complainants (defendants in error) against Theodore E. Ray and certain other defendants.

It appears from the record that on March 2, 1928, the said defendants, Theodore E. Ray and Nell R. Ray, owned the property known as 6030-32 Drexel Boulevard, Chicago, Illinois; that the premises were improved with a 17 room 2-story brick and stone residence, and a substantial 3-story stable-garage-apartment on the rear of the land, which improvements originally cost $45,000; that the house had been remodeled into a 3-apartment building, the first floor renting for $120. per month; the second floor for $125. per month, and the third floor for $115. per month; that the 3-car garage and the apartment both, rented for $27.50 per month; that Theodore E. Ray, one of the defendants, valued the land at $800 a front foot, or a total of $48,000, and the improvements at $15,000.

On the date therefore referred to, the said defendants, Theodore E. Ray and Nell R. Ray, executed $40,000. 8 per cent first mortgage on the premises, due on March 2, 1931; and thereafter on May 1, 1928, they executed a $10,000. 8 per cent second mortgage on the same premises.

The note secured by the second mortgage was owned by the complainant Donald S. McWilliams, which mortgage was foreclosed in these proceedings.

On October 1, 1928, the said Theodore W. May and Bell R. May, defendants, conveyed said premises to The Forty Six Twenty Drexel Boulevard Building Corporation, an Illinois Corporation, of which J. S. Nadel was president, organized to erect on said premises a large 7-story apartment building. This conveyance is still in the escrow department of the Chicago Title & Trust Company; only $5,000 of the agreed consideration of $41,000 was paid by the corporation to the Mays.

On the same date, viz., October 1, 1928, the Forty-six Twenty Drexel Boulevard Building corporation executed a trust deed to secure an issue of 613 bonds, aggregating $270,000, which was recorded. The bonds, however, were never signed, negotiated or delivered.

Both the Central Manufacturing District Bank and Bertram M. Winston, representing the owner of the $30,000 first mortgage, and the complainant, Donald S. McWilliams, owner of the $10,000 second mortgage, refused to consent to the wrecking of the then existing improvements on the premises, which improvements added $15,000 to their security.

In the middle of November, 1928, without the knowledge of said mortgage holders, said J. S. Nadel put a crew of wreckers on said buildings and completely demolished them; and also without their knowledge, proceeded to erect a new 7-story apartment building. The foundation work was completed; forms had been built, and concrete poured, and the walls had advanced to about half a story above the ground, when the work came to a stop. Many of the forms were still standing, and quantities of materials were on the ground. Some of the sewer work had been done, and a new sewer had been laid from

The debt secured by the second mortgage was owned by the complainant Donald C. McWilliams, which mortgage was foreclosed in these proceedings.

On October 1, 1929, the said Theodore G. Ray and Nell E. Ray, defendants, conveyed unto premises to the Forty Six Twenty Based Employees Building Corporation, an Illinois Corporation, of which J. C. Weber was President, organized to erect on said premises a large 7-story apartment building. This apartment is still in the active department of the Chicago Title & Trust Company; only 18,000 of the agreed consideration of $41,000 was paid by the corporation to the Ray.

On the same date, viz., October 1, 1929, the Forty-six Twenty Owner Employee Building Corporation executed a trust deed to secure an issue of $12 bonds, aggregating $120,000, which was recorded. The bonds, however, were never signed, negotiated or delivered.

Both the general contractors Jackson Bros and Partner E. Simpson, representing the owner of the 120,000 first mortgage, and the complainant, Donald C. McWilliams, owner of the $10,000 second mortgage, refused to consent to the recording of the trust deed giving jurisdiction on the premises, which improvements added $15,000 to their security.

In the middle of November, 1929, without the knowledge of said mortgage holders, said J. C. Weber put a crew of workmen on said building and completely demolished them; and also without their knowledge, proceeded to erect a new 7-story apartment building. The foundation work was completed; forms had been built, and concrete poured, and the walls had advanced to about half a story above the ground, when the work came to a stop. Most of the items were still standing, and quantities of materials were on the ground. Some of the sewer work had been done, and a new sewer had been laid from

the proposed outlets of the building to the street; certain connections had been made with the City water pipes, and a lot of rough carpentry work had been done.

Failure to negotiate the $270,000 loan, and failure on the part of J. S. Nadel to pay off the $20,000 first mortgage and the $10,000 second mortgage, change of plans in order to comply with a 38-foot front building line, and the inability to obtain a building permit from the Building Department of the City of Chicago, on the plans tendered, prevented the continuance of the work.

Thereafter, mechanics' lien claims, aggregating approximately $12,000, were filed against the premises, all claiming priority over said encumbrances; and two suits were pending to foreclose mechanics' lien claims, in one of which the owner of the $20,000 first mortgage appeared by counsel.

The solicitor for the complainant, Donald S. McWilliams, who testified before the Master as to the legal services rendered and to be rendered by him and his firm, took into consideration the surrounding facts, and basing his opinion on 350 hours spent and the results accomplished, stated the fair, reasonable, usual and customary charge for solicitors in this jurisdiction for like services to be $3500. This testimony was in the presence of Theodore W. May, one of the defendants, and his solicitor; both of whom the record shows were present. In response to the Master's question, "Any cross-examination?" Mays' solicitor replied, "No cross-examination."

The Master upon filing his report on April 18, 1930, among other things found $3500 to be a reasonable fee to be allowed to the complainant, Donald S. McWilliams, for the services of his solicitor, to which Master's report these defendants filed no objection nor filed exceptions to the report when presented to the trial court for approval.

The decree of sale entered on March 11, 1930, fixed the debt due and owing to the complainant, Donald S. McWilliams,

the present owners of the building by the street; certain encumbrances had been made with the City water pipes, and a lot of trash negligently left the same line.

Failure to negotiate the $250,000 loan, and failure on the part of J. E. Hudson to pay off the $80,000 first mortgage and the $10,000 second mortgage, caused an order to enter to sell with a 99-year lease building item, and the receiver to retain a building permit from the building department of the City of Chicago, on the ground that, therefore, the continuance of the work.

Thereafter, mechanics' lien claims, aggregating approximately $15,000, were filed against the premises, all claiming priority over said encumbrances; and no notice was required to foreclose mechanics' lien claims, in one at least the amount of the $20,000 first mortgage supported by counsel.

The matter for the complainant, Donald E. Hamilton, who testified before the Master as to the legal services rendered and to be rendered by him and his firm, took into consideration the encumbrances there, and based his claims on 300 hours spent and the results accomplished, which the City, reasonably, could not necessarily claim for matters in this jurisdiction for like services to be $5000. This testimony was in the presence of Theodore W. Hay, one of the defendants, and his solicitor; both of whom the report shows were present. In response to the Master's question, "Any mechanics-complainants' claims, mortgages unpaid, the stockholders," one of the defendants, Donald E. Hamilton, for the services of his solicitors, to which counsel's report shows defendants filed no objection, for filed statutes in the report shows presented to the first meet the objection.

The Master upon filing his report on April 19, 1920, among other things found $5000 to be a reasonable fee to be allowed to the complainant, Donald E. Hamilton, for the services of his solicitors, to which counsel's report shows defendants filed no objection, for filed statutes in the report shows presented to the first meet the objection.

The decree of this matter on March 17, 1920, fixed the debt due and owing to the complainant, Donald E. Hamilton,

at $15,596.36, which included $3500 for solicitor's fees, and a second lien on the premises, subject only to the $20,000 first mortgage, and subrogated all to the mechanics' lien claims, aggregating about $12,000, to the first and second mortgages. The Master's report had found the amount due the complainant, Donald S. McWilliams, to be $14,996.36, but before the decree was entered, said complainant, on March 2, 1930, was compelled to advance an additional $600 to pay interest on the $20,000 first mortgage. This was, therefore, included in the decree.

Thereafter, a sale of the real estate was had under the terms of the decree. The Master filed a report of sale and distribution, from which it appears that the complainant, Donald S. McWilliams, was entitled to a deficiency degree against the defendants, Theodore W. May and Bell R. May, for the sum of $3,728, being the difference between the sale price of $12,000 offered and paid by the complainant, Donald S. McWilliams, and the amount then due; and, on the same day, an order confirming the Master's report of sale and distribution and a deficiency decree, was entered by the court, without objection of record.

The only objection made on this appeal by the defendants, May, is that the solicitor's fees of $3500 allowed to the complainant Donald S. McWilliams, are grossly excessive. This may appear to be so, but there is uncontradicted evidence that 350 hours of service were rendered by the complainants' solicitor and that $3500 was a fair and reasonable fee for the work required to be performed in this case.

Parties aggreived will not be permitted to stand by upon a trial and allow a Master's report and a sale under a decree to be approved by the court without objection, and then expect a reviewing court to consider the objections which should have been called to the attention of the trial judge. It is too late for these defendants to object to this allowance at this time.

at $11,104.37, which included $1000 for solicitor's fees, and a second lien on the premises, subject only to the $20,000 first mortgage, and subrogated all to the vendors' lien claims, aggregating about $25,000, to the extent was second mortgagee. The master's report had found the amount due the complainant, Donald E. Mcwilliams, to be $14,944.30, but before the decree was entered, said complainant, on April 4, 1920, was committed by judicial act that $200 be his interest on the $20,000 first mortgage. This was, therefore, included in the decree.

Therefore, a sale of the real estate was had under the terms of the decree. The Master filed a report of sale and distribution, from which it appears that the complainant, Donald E. Mcwilliams, was entitled to a deficiency decree against the defendants, Theodore E. Jay and Dell K. Ray, for the sum of $3,728, being the difference between the sale price of $18,000 offered and paid by the complainant, Donald E. Mcwilliams, and the amount then due; and, on the same day, an order confirming the Master's report of sale and distribution was a deficiency decree, was entered by the court, without objection or account.

The only objection made on this appeal by the defendants, Ray, is that the solicitor's fee of $1000 allowed to the complainant Donald E. Mcwilliams, are grossly excessive. This may appear to be so, but there is unauthenticated evidence that 250 hours of service were rendered by the complainants' solicitor and that $1000 was a fair and reasonable fee for the work required to be performed in this case.

Petition appellant will not be permitted to stand by upon a trial and allow a Master's report and a sale under a decree to be approved by the court without objection, and then expect a reviewing court to consider the objections which should have been called to the attention of the trial judge. It is too late for these defendants to object to this allowance at this time.

Smyth et al v. Stoddard, 303 Ill. 424;
Kronkrite et al v. McGrath, 82 Ill. App. 340;
Obermann Brewing Co. Ohlerking, 33 Ill. App. 26;
Sampson, et al v. Neely, Trustee, et al, 106 Ill. App. 129;
Marsh v. Mick, 159 Ill. App. 399
Chicago Title & Trust Co., Trustee, et al, v. Franklin, 187 Ill. App. 388.

The complainant Donald S. McWilliams has called our attention to the fact that the decree, which was a draft of the Master's recommendations, was O.K.'d and signed by the defendants' solicitor before the decree was signed and entered in this cause; and therefore by such act it became a consent decree. Such is the rule, and a case in point is Bergman v. Rhodes, 334 Ill. 137, wherein the court said:

> "A consent decree is not a judicial determination of the rights of the parties. It does not purport to represent the judgment of the court but merely records the agreement of the parties. A decree so entered by consent can not be reviewed by appeal or writ of error. (Paine v. Doughty, 251 Ill. 396; Galway v. Galway, 231 id. 217). It can only be set aside by an original bill in the nature of a bill of review. (Hohenadel v. Steele, 237 Ill. 229.) In Hungarian Benevolent Society v. Aid Society, 283 Ill. 99, it was held that where neither party objected to a master's report, a decree in accordance with the master's finding, which was approved before entry by the O. K. and signature of counsel for both sides, became a consent decree, that where an attorney is the counsel of record for a client, his agreement in the conduct and management of the litigation must be considered as the agreement of his client, and if any of his acts are without sufficient authority as between him and his client the remedy of the client is against the counsel."

The motion made by the complainants, Donald S. McWilliams and Hugh L. McWilliams, to quash the writ of error, will not be entertained, for the reason that the questions called to our attention by that motion are disposed of by this court in this opinion.

The decree, the order confirming the Master's report of sale and distribution, and the deficiency decree, are, accordingly, affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

Smyth et al v. Stanford, 108 III. 404;
Kimmerlin et al v. Morris, 60 Ill. 490, 492;
Chicago Dredging v. Blackman, 61 Ill. 102, 103;
Sampson, et al v. Sandy, Trustee, et al, 108 Ill. 102, 104;
Bevan v. Wirth, 108 Ill. 424, 430;
Chicago Title & Trust Co., Trustee, et al v. Trumbull,
187 Ill. 420, 424.

The complainant Donald S. Boylikian has called our attention to the fact that the decree, which was a draft of the master's recommendations, was O.K.'d and signed by the defendants' solicitor before the decree was signed and entered in this cause; and therefore by such act it became a consent decree. Such is the rule, and a case in point is Jackson v. Hayden, 176 Ill. 137, wherein the court said:

> "A consent decree is not a judicial determination of the rights of the parties. It does not purport to represent the judgment of the court but merely records the agreement of the parties. A decree so entered by consent can not be reviewed by appeal or writ of error. (Lyon v. Jewett, 151 Ill. 380; Dalzell v. Dalzell, 201 Ill. 212.) It can only be set aside by an original bill in the nature of a bill of review. (Hutchinson v. Ziegler, 197 Ill. 488.) In Northern Illinois Loan & Building Co. v. Nat. Bank, 207 Ill. 99, it was held that where neither party objected to a master's report, a decree in accordance with the master's finding, which was approved before entry by the ct. K. and signature of counsel for both sides, became a consent decree, that where an attorney in the course of record for a client, his agreement in the conduct and management of the litigation must be assumed as the agreement of his client, and if any of his acts are without sufficient authority as between him and his client the remedy of the client is against the opposed."

The motion made by the complainants, Donald S. Boylikian and Hugh L. Boylikian, to quash the writ of error, will not be entertained, for the reason that the questions called to our attention by that motion are disposed of by this court in this opinion.

The decree, the order confirming the master's report of sale and distribution, and the dictatory decree, are, respectively, affirmed.

AFFIRMED.

GIBSON, P.J. and FOSTER, J. concur.

34533

JOSEPH SZAREK, a minor, by ANNA SZAREK, his mother and next friend,	)	WRIT OF ERROR TO
Plaintiff in Error.	)	SUPERIOR COURT,
v.	)	
JOSEPHINE SUM SZAREK,	)	COOK COUNTY.
Defendant in Error.	)	

A-75

261 I.A. 651

Opinion filed May 13, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This case is before us on a writ of error prosecuted by the complainant (plaintiff in error), by Anna Szarek, his mother and next friend, to review the record of the trial court in dismissing the complainant's bill for want of equity.

The complainant filed a bill to annul a marriage on the ground that the complainant, a minor seventeen years of age and under the statutory minimum age of consent, which is eighteen, was without legal capacity to enter into a marriage ceremony; that the complainant entered into the marriage ceremony under duress brought about by the defendant's mother, with the knowledge and consent of the defendant, and by reason of a marriage license being procured by fraud; and that said marriage was not consummated or ratified by the complainant when he reached the statutory minimum age of consent.

The defendant, being also a minor, through her guardian, ad litem, answered the bill, not admitting or denying, but demanding strict proof.

Upon the trial, evidence developed that the defendant had a child born to her one week before the marriage ceremony was performed, but the complainant denied that he was the father of said child, and the court, after a hearing, dismissed the bill for want of equity.

From an examination of the record, we are of the

JOSEPH BANKS, a minor, by
ANNA BANKS, his mother and
next friend,

Plaintiff in Error,

v.

JOSEPHINE BUS BANKS,

Defendant in Error.

Error to the Superior Court
of Cook County.

Opinion filed May 13, 1931

MR. JUSTICE ATHERTON delivered the opinion of the court.

This cause is before us on a writ of error prosecuted by the complainant (plaintiff in error), by leave granted, his mother and next friend, to review the remedy of the trial court in dismissing the complainant's bill for want of equity.

The complainant filed a bill to annul a marriage on the ground that the complainant, a minor seventeen years of age and under the statutory minimum age of consent, which is eighteen, was without legal capacity to enter into a marriage ceremony; that the complainant entered into the marriage ceremony under duress brought about by the defendant's mother, with the knowledge and consent of the defendant, and by reason of a marriage license being procured by fraud; and that said marriage was not consummated or ratified by the complainant when he reached the statutory minimum age of consent.

The defendant, being also a minor, through her guardian, ad litem, answered the bill, and admitting on trial, but denying error thereon.

Upon the trial, evidence developed that the defendant had a child born to her one week before the marriage ceremony was performed, but the complainant denied that he was the father of said child, and the court, after a hearing, dismissed the bill for want of equity.

From an examination of the record, we are of the

opinion that this case must be reversed, and that it will not be necessary for the court to comment on the evidence, except to point out the facts that warrant a reversal and a new trial.

The mother of the defendant, Mary Sum, signed the name of complainant's mother, who was not present, to an application for a marriage license, and was sworn to the facts set up in the application, the necessity for such act being the fact that the complainant was only seventeen years of age, and consent of the parents was necessary in order that the County Clerk issue a marriage license to the parties. Such act by the mother was a violation of the statutory provision under Chap. 89, Sec. 3, Cahill's Ill. Rev. Stats., and such violation was admitted in open court. This witness when testifying indicated that an oath to tell the truth meant very little, and her conduct on the stand called for a reprimand by the court.

The complainant testified that the mother of the defendant appeared before the County Clerk, in the presence of the complainant and the defendant, and falsely represented herself to be Anna Szarek, the complainant's mother, and signed the name of the complainant's mother to the application for the marriage license; that at that time the defendant's mother showed the complainant a black bag with a revolver in it, and told him that if he did not sign the papers handed to him at the Clerk's window and answer the Clerk's questions as she wanted him to, she would kill him and his mother, or have the "Three tough looking fellows", who were standing there, kill them.

The complainant further testified that thereafter the complainant, while on his way to supper, was taken by force, in an old car by the three men that he saw at the marriage license window to the defendant's home, and the defendant's mother again threatened him; that he was then taken by force in the same car by the same men to within a block of St. Bonifact Church, and was told to stand on the sidewalk, and, after the defendant and her sister arrived, one of the

opinion that this case must be reversed, and that it will not be necessary for the court to comment on the evidence, except to point out the facts that warrant a reversal and a new trial.

The mother of the defendant, Mary Sue, signed the name of complainant's mother, who was not present, to an application for a marriage license, and was sworn to the facts set up in the application, the necessity for such being the fact that the complainant was only seventeen years of age, and consent of the parents was necessary in order that the County Clerk issue a marriage license in the premises. Such act by the mother was a violation of the statutory provision under Chp. 69, Lws. 1, Gahill's Ill. Rev. Stats., and such violation was admitted in open court. This witness when testifying indicated that an oath to tell the truth meant very little, and her manner as the stand called for a reversal by the court.

The complainant testified that the mother of the defendant appeared before the County Clerk, in the presence of the complainant and the defendant, and falsely represented herself to be Lena Smart, the complainant's mother, and signed the name of the complainant's mother to the application for the marriage license; that at that time the defendant's mother showed the complainant a black bag with a revolver in it, and told him that if he did not sign the papers handed to him at the clerk's window and answer the clerk's questions as she wanted him to, she would kill him and his mother, or have the "three rough looking fellows", who were standing there, kill them.

The complainant further testified that thereafter the complainant, while in his car in Joplin, was taken by force, in an old car by the three men that he saw at the marriage license window to the defendant's home, and the defendant's mother again threatened him; that he was then taken by force in the same car by the same men to within a block of St. Louisfet church, and was told to stand on the sidewalk, and, after the defendant and her sister arrived, one of the

three men got out of the car and came up to him and said, "If you don't go through with this marriage, we will get you when you come out" and showed him a revolver; that the marriage took place at 7:30 in the evening, and that after leaving the church he was further threatened by the defendant's mother not to tell his mother, or any one of his family, or he would be killed. This evidence of the complainant is not denied or contradicted by any evidence offered by the defendant.

From this evidence, the complainant was not a free agent, but was impelled by the threats of the defendant's mother and made to enter into a contract of marriage. Some of the threats were made in the presence of the defendant in this case, and it would seem, where such facts were testified to by the complainant, that evidence bearing upon the charge should have been presented on behalf of the defendant.

The decree entered in this case is manifestly against the weight of the evidence, and the court was in error in dismissing complainant's bill for want of equity.

There is evidence in the record offered by the defendant which is subject to criticism, but in view of the fact that a further trial is necessary, this court will make no further comment, except to say that the failure of the defendant to enter her appearance and file a brief does not assist this court in determining the questions before us.

For the reasons indicated, the decree of the court dismissing the complainant's bill for want of equity is reversed and the cause remanded for a new trial.

REVERSED AND CAUSE REMANDED.

WILSON, P.J. AND FRIEND, J. CONCUR.

three men got out of the car and came up to him and said, "If you don't go through with this marriage, we will get you when you are not." and showed him a revolver; that the marriage took place at 7:30 in the evening, and that after leaving the church he was further threatened by the defendant's mother and all his relatives, so that he of his family, or he would be killed. This evidence of the complainant is not denied or contradicted by any witnesses offered by the defendant.

From this evidence, the complainant was not a free agent, but was impelled by the threats of the defendant's mother and made to enter into a contract of marriage. Some of the threats were made in the presence of the defendant in this case, and it could have been such facts were testified to by the complainant. This evidence bearing upon the charge should have presented on behalf of the defendant.

The decree entered in this case is manifestly against the weight of the evidence, and the court was in error in dismissing complainant's bill for want of equity.

There is evidence in the record offered by the defendant which is subject to criticism, but in view of the fact that a further trial is necessary, this court will make no further comment, except to say that the failure of the defendant to enter her appearance and file a motion does not excuse this court in dispensing the questions before us.

For the reasons indicated, the decree of the court dismissing the complainant's bill for want of equity is reversed and the cause remanded for a new trial.

REVERSED AND OTHER REMANDED.

Green, P.J. and Trieber, J. concur.

34544

HARRY POTICHA, MIKE ZENIS, HYMAN FISHMAN,

Appellants,

v.

MABEL C. WOLFE,

Appellee.

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY.

261 I.A. 652

Opinion filed May 13, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This is an appeal by the complainants from a decree dismissing complainants' bill for want of equity. The bill is for the reformation of a renewal clause in a lease and for specific performance of the lease as reformed. After a hearing, the court dismissed the bill for want of equity with specific findings to the effect that: The complainants executed the lease with a full and complete knowledge of its terms; there was no fraud in the execution of the lease; there is no evidence of the true rental value of the premises; the renewal clause is vague and indefinite as to future rental; there is no fraud, accident or mistake as a basis for reformation, and that the complainants have an adequate remedy at law.

In May, 1925, complainants leased a store from the defendant, known as 4739 South Ashland Avenue, Chicago, Illinois, for a five-year period, with a clause giving an option for a renewal for five additional years at such rental as, "the Lessor, her heirs or assigns shall determine to charge". A tendered renewal lease by the defendant, fixing the rental at $2,000 per month, was rejected on the ground that the rent was unreasonably high. The complainants' theory is that they were induced to sign the five-year lease by the defendant's contemporaneous oral promise to be reasonable in fixing the rental for the rental period; that the defendant arbitrarily fixed the rental unreasonably high, which constitutes a fraud; that the court should reform the lease by striking out the language, "as

Opinion filed May 13, 1931

Mr. JUSTICE STONE delivered the opinion of the court.

This is an appeal by the complainants from a decree dismissing complainants' bill for want of equity. The bill is for the reformation of a renewal clause in a lease and for specific performance of the lease as reformed. After a hearing, the court dismissed the bill for want of equity and entered findings as the ultimate facts: The complainants executed the lease with a full and complete knowledge of its terms; there was no fraud in the execution of the lease; there is no evidence of the true rental value of the premises; the renewal clause is vague and indefinite as to future rental; there is no fraud, mistake or error as a basis for reformation, and that the complainants have an adequate remedy at law.

In May, 1926, complainants leased a store from the defendant, known as 4138 South Ashland Avenue, Chicago, Illinois, for a five-year period, with a clause giving an option for a renewal for five additional years at such rental as, "the lessor, her heirs or assigns shall determine to charge". A tendered renewal lease by the defendant, fixing the rental at $[illegible] per month, was rejected on the ground that the rent was unreasonably high. The complainants' theory is that they were induced to sign the five-year lease by the defendant's fraudulent representations to be reasonable in fixing the rental for the renewal period; that the defendant arbitrarily fixed the rental unreasonably high, which constitutes a fraud; that the court should reform the lease by striking out the language, "as

said lessor, her heirs or assigns shall determine to charge," and insert in lieu thereof, apt words expressing a reasonable sum as the rental for the renewal period, and decree specific performance on that basis.

On the other hand, the defendant contends that the transaction is free of fraud; that the lease is the one the parties intended to execute, and therefore not subject to reformation; that the lease has been fully performed, and that the renewal clause is void for uncertainty.

This controversy hinges on the construction of a provision in the lease between the parties to this litigation, which provision is in these words:

> "A renewal lease for the further term of five years, at such rental as the lessor shall determine to charge for said demised premises, whether the same be a greater amount or at the rate of the present monthly rental."

It appears from the facts in evidence that at the time the lease was executed by the parties, the question of an extension at the expiration of the term of the lease was the subject of negotiation. The complainants were desirous of a five year extension, at a rental of $325 per month, but the defendant would only consent to the extension upon the terms incorporated in the lease, which was finally agreed to by all parties.

The complainants contend that the act of the defendant in tendering a lease at a rental of $2,000, was fraud and not in accord with the intention of the parties.

There was no fraud charged in respect to the execution of the lease. The facts indicate that the subject of renewal was discussed with the parties before the execution of the lease, and as a result of the discussion the provision incorporated and written in the lease was the agreement of the parties, and that by that act all contemporaneous oral promises or agreements were merged in the written document.

said lessor, her heirs or assigns shall determine to charge," and insert in lieu thereof, "at rates approximating a reasonable sum as the rental for the renewal period, and doing equitable performance on that basis.

On the other hand, the defendant asserts that the transaction is free of doubt; that the lease is the sole the parties intended to execute, and therefore not subject to reformation; that the lease has been fully performed, and that the renewal clause is void for uncertainty.

This controversy hinges on the construction of a provision in the lease between the parties to this litigation, which provision is in these words:

> "A renewal lease for the further term of five years, at such rental as the lessor shall determine to charge for said demised premises, whether the same be a greater amount or at the rate of the present monthly rental."

It appears from the face in evidence that at the time the lease was executed by the parties, the question of an extension at the expiration of the term of the lease was the subject of negotiations. The complainants were desirous of a five year extension, at a rental of $250 per month, but the defendant would only consent to the extension upon the terms incorporated in the lease, which was finally agreed to by all parties.

The complainants contend that the act of the defendant in tendering a lease at a rental of $3,000, was fraud and not in accord with the intention of the parties.

There was no fraud charged in respect to the execution of the lease. The facts indicate that the subject of renewal was discussed with the parties before the execution of the lease, and as a result of the discussion the provision incorporated was written in the lease was the agreement of the parties, and that by that act all contemporaneous oral promises or agreements were merged in the written document.

The parties to this litigation were persons of business experience and must have understood the meaning of the words used, "at such rental as the lessor shall determine to charge for said premises." The language is not ambiguous; its meaning is clear. The lessor reserved the right to fix the future rental for the extension period. The fact that the rent was fixed at $2,000 per month by the defendant was a right which she had reserved in the contract, and this court will not interfere or exercise its judgment in determining whether or not the amount was a reasonable one. There is evidence, however, that a tenant rented the entire building at a monthly rental of $1,000. The complainants may have believed that the defendant would fix a more reasonable rental for the extension period, and if in their opinion the rental was not reasonable, they would be under no obligation to continue in possession.

The contract was entered into by the parties, and the court will not, under the facts in evidence, modify or amend the contract of the parties, nor interfere, except to enforce its provisions. The rule is that a court of equity will not reform an instrument when it was prepared in the presence of the parties, read over by them, and signed without mistake as to its wording. None of the subject matter agreed upon between the parties was left out by the writer; nor was any that had not been agreed upon inserted. Bolsey v. Neeley, 46 Ill. App. 387.

The instant case comes within this rule, and the complainants are not, under the facts, entitled to the relief prayed for. The defendant offered to perform, after the three months' notice was given by the complainants and tendered a lease, at a monthly rental of $2,000, which was not accepted by the complainants, and for the reasons indicated in this opinion, the decree entered by the trial court dismissing the complainants' bill for want of equity, is affirmed.

DECREE AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

The parties to this litigation are persons of business experience and must have understood the meaning of the words used, "at such rental as the lessor shall determine to charge for said premises." The language is not ambiguous; its meaning is clear. The lessor reserved the right to fix the fixed rental for the extension period. The fact that the rent was fixed at $2,000 per month by the defendant was a right which she had reserved in the contract, and this court will not interfere or substitute its judgment in determining whether or not the amount was a reasonable one. There is evidence, however, that a person renting the entire building at a monthly rental of $1,000. The complainants may have believed that the defendant would fix a more reasonable rental for the extension period, and if in their minds the rental was not reasonable, they could be under no obligation to continue in possession.

The contract was entered into by the parties, and the court will not, under the guise of evidence, modify or amend the contract of the parties, nor interfere, except to enforce the provisions. The rule is that a court of equity will not relieve an instrument when it has received in the presence of the parties, and overlooked them, and signed without mistake or inadvertence. None of the subject matter signed upon between the parties was left out by the mistake; nor was any that had not been signed upon inserted. Tolbert v. Bailey, 46 Ill. App. 327.

The instant case comes within this rule, and the complainants are not, under the law, entitled to the relief sought for. The defendant offered to perform, after the three months' notice was given by the complainants and tendered a lease, at a monthly rental of $2,000, which was not accepted by the complainants, and for the reasons indicated in this opinion, the decree entered by the trial court dismissing the complainants' bill for want of equity, is affirmed.

MINOR, P.J. AND DIXON, J. CONCUR.

JUDGE AFFIRMED.

34559

THE GUARANTEE COMPANY OF NORTH AMERICA, a corporation, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT
WM. V. HOIER, Appellant.	)	COOK COUNTY.

261 I.A. 652

Opinion filed May 13, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

The plaintiff, The Guarantee Company of North America, a corporation, brought suit in assumpsit against Wm. V. Hoier, defendant, to recover upon an alleged indemnity agreement between the defendant and the plaintiff. A trial was had before a jury, and at the close of the case a verdict was returned assessing the damages against the defendant, Wm. V. Hoier, in the sum of $12,523.72. After motions for a new trial and in arrest of judgment were overruled, judgment was entered on the verdict. To reverse said judgment this appeal is prosecuted by the defendant.

The plaintiff filed in said cause a second amended declaration, which was further amended and consisted of two counts, to which defendant filed a plea of the general issue, with notice of special defenses under said plea, together with his affidavit of merits.

It appears from the evidence in the record that on September 24, 1925, the Inland Engineering Company, of Hammond, Indiana (hereinafter referred to as the contractor), made application to the Guarantee Company of North America, the plaintiff in this cause, for a certain surety bond running to the Elks Realty Company, of East Chicago, Indiana, in the penal sum of $58,365, in connection with a contract alleged to have been entered into on said date between said contractor and the said Elks Realty Company (hereinafter referred to as the owner), for the furnishing of all labor and materials, and

Opinion filed May 13, 1931

MR. JUSTICE MORRIS delivered the opinion of the court:

The plaintiff, The Western Company of North America, a corporation, brought this in assumpsit against Wm. V. Maier, defendant, to recover upon an alleged indebtedness between the defendant and the plaintiff. A trial was had before a jury, and at the close of the case a verdict was returned assessing the damages against the defendant, Wm. V. Maier, in the sum of $13,823.72. After motions for a new trial and in arrest of judgment were overruled, judgment was entered on the verdict. To review said judgment this appeal is prosecuted by the defendant.

The principal plea in said cause a general traverse declaration, which was further amended and maintained of the counts, to which defendant filed a plea of the general issue, also notice of special defense under said plea, together with his affidavit of merits.

It appears from the evidence in the record that on September 24, 1928, the Lemon Engineering Company, a Tennessee Indiana (hereinafter referred to as the contractor), made application to the Guarantee Company of North America, the plaintiff in this cause, for a certain surety bond running to the Elko Realty Company, of East Chicago, Indiana, in the penal sum of $38,000, in connection with a contract alleged to have been entered into on said date between the contractor and the said Elko Realty Company (hereinafter referred to as the owner), for the furnishing of all labor and materials, and

for the heating, ventilating and plumbing work to be installed in a certain 3-story and basement building to be erected for said owner.

As a result of said application for the bond, the plaintiff corporation did execute said surety bond to said owner, on the 24th day of September, 1925. An indemnity agreement attached to the application for the surety bond was executed by the defendant, Wm. V. Moier. Subsequent to the execution of the surety bond, on September 30, 1925, the owner and the contractor entered into a building contract, setting forth the work to be performed, the terms and conditions of employment, and all matters relating to the contractor's duties.

Thereafter, the contractor proceeded with the work under its contract, and from time to time submitted estimates of work completed and its value in dollars and cents to the architect, who examined the estimates and the work to determine their correctness, and issued his certificates authorizing payment to the contractor. This continued through the month of September, 1926, when the contractor submitted for approval his eleventh estimate introduced in evidence, showing in figures that the entire contract with extras had been completed and a balance due the contractor of $14,554.22. The evidence shows that the architect examined the same, inspected the work, and thereupon, on or about the 10th of October following, issued his architect's certificate in the sum of $8,000, which was paid to the contractor.

Following this payment it appears that the owner of the property made complaint to the plaintiff corporation that the contractor was not complying with his contract, and there is evidence that notice was given to the defendant of such alleged default and calling upon him to save the plaintiff harmless from and by reason of having executed its surety bond, which, however, is denied by the defendant.

It appears from the evidence that after the payment to the contractor of the sum of $8,000, there remained due said contractor

for the heating, ventilating and plumbing work to be installed in a certain 3-story and basement building to be erected for said owner.

As a result of said application for the bond, the plaintiff corporation did execute said surety bond to said owner, on the 3rd day of September, 1920. In consideration expressed attached to the application for the surety bond was executed by the defendant, Wm. T. Moler. Subsequent to the execution of the surety bond, on September 20, 1920, the owner and the contractor entered into a building contract, setting forth the work to be performed, the terms and conditions of employment, and all matters relating to the contractor's duties.

Thereafter, the contractor proceeded with the work under the contract, and from time to time submitted estimates of work completed and its value in dollars and cents to the architect, who examined the estimates and the work to determine their correctness, and issued his certificates authorizing payment to the contractor. This continued through the month of December, 1920, when the contractor submitted for approval his eleventh estimate introduced in evidence, showing in figures that the entire contract with extras had been completed and a balance due the contractor of $14,[illegible]. The evidence shows that the architect examined the work, inspected the work, and thereupon, on or about the 10th of October following, issued his architect's certificate in the sum of $4,000, which was paid to the contractor.

Following this payment it appears that the owner of the property made complaint to the plaintiff corporation that the contractor was not complying with his contract, and there is evidence that notice was given to the defendant of such alleged default and calling upon him to cure the default. Thereupon the defendant by reason of having executed its surety bond, which, however, is denied by the defendant.

It appears from the evidence that after the payment to the contractor of the sum of $4,000, there remained due said contractor

for the heating, ventilating and plumbing work to be installed in a certain 3-story and basement building to be erected for said owner.

As a result of said application for the bond, the plaintiff corporation did execute said surety bond to said owner, on the 3rd day of September, 1920. In consideration expressed attached to the application for the surety bond was executed by the defendant, Wm. T. Moler. Subsequent to the execution of the surety bond, on September 20, 1920, the owner and the contractor entered into a building contract, setting forth the work to be performed, the terms and conditions of employment, and all matters relating to the contractor's duties.

Thereafter, the contractor proceeded with the work under the contract, and from time to time submitted estimates of work completed and its value in dollars and cents to the architect, who examined the estimates and the work to determine their correctness, and issued his certificates authorizing payment to the contractor. This continued through the month of December, 1920, when the contractor submitted for approval his eleventh estimate introduced in evidence, showing in figures that the entire contract with extras had been completed and a balance due the contractor of $14,[illegible]. The evidence shows that the architect examined the work, inspected the work, and thereupon, on or about the 10th of October following, issued his architect's certificate in the sum of $4,000, which was paid to the contractor.

Following this payment it appears that the owner of the property made complaint to the plaintiff corporation that the contractor was not complying with his contract, and there is evidence that notice was given to the defendant of such alleged default and calling upon him to cure the default. Thereupon the defendant by reason of having executed its surety bond, which, however, is denied by the defendant.

It appears from the evidence that after the payment to the contractor of the sum of $4,000, there remained due said contractor

the sum of $7,854.70, which was in the hands of the owner, and it also appears that the owner made numerous payments between November, 1926 and September, 1927, totalling $7,506.24, leaving a balance in the owner's hands of $348.46, which it turned over to the plaintiff company; and that the plaintiff company in July and August of 1927, paid out a total sum of $12,288.48 direct to sub-contractors. It appears that these payments were made by checks issued by the plaintiff company to the individuals therein named.

There appears to be no question as to the date of the execution of the application for the surety bond, the execution of the surety bond and the execution of the building contract. The record discloses some conflict in the evidence as to whether the contract of indemnity of the defendant was executed on the date it bears, or whether it was executed some time later.

It was on the question of the date of the indemnity agreement that the defendant called as his witness Frank J. Opelka, and the defendant contends that while the witness was on the stand testifying the trial court made remarks in the presence of the jury which tended to discredit the witness, and which were prejudicial to the defendant, who offered this witness. In support of this contention the defendant quotes from the record the following:

"The Court: I would like to ask a question.
A. Yes.
Q. Do you want the Court and jury to understand you testified to this signature as a witness and there wasn't any signature there? A. The signature was there when I signed it.
Q. But you witnessed the signing, didn't you? A. I did not.
Q. Well, what do you understand a witness to be to a document?
A. Well, you are supposed to see a document signed.
Q. And you did not see it? A. I did not.
Q. And you knew he did not sign when you signed? A. I knew it.
Q. And you knew you were perpetrating a confidence game, didn't you. A. I wouldn't say that.
Mr. Meinecker: I object to those remarks.
The Court: Don't you know that is what it was if your testimony is true here? You are testifying to a signature that you did not see and you did not know.
A. Yes, your Honor.
Q. For what purpose? A. Just to complete an application.

the sum of $7,326.70, which was in the hands of the owner, and it also appears that the owner said monthly payments totaling thereafter, June and September, 1917, totalling $7,326.46, leaving a balance in the owner's hands of $3.46, which it turned over to the plaintiff company; and that the plaintiff company in July and August of 1917, paid out a total sum of $13,[illegible].46 direct to sub-contractors. It appears that these payments were made by checks issued by the plaintiff company to the individuals mentioned.

There appears to be no question as to the date of the execution of the application for the surety bond, the execution of the surety bond and the execution of the building contract. The record discloses some conflict in the evidence as to whether the execution or issuance of the document was reported on the date it bears, or whether it was executed some time later.

It was on the question of the date of the indemnity agreement that the defendant called as his witness Frank S. Cogley, and the defendant contends that while the witness was on the stand testifying the trial court made remarks in the presence of the jury which tended to discredit the witness, and which were prejudicial to the defendant, who offered this witness. In support of this contention the defendant quotes from the record the following:

"The Court: I would like to ask a question.

Q. Yes.

Q. Do you want the Court and jury to understand you testified on this agreement as a witness and there wasn't any signature there? A. The signature was there when I signed it.

Q. But you witnessed the signing, didn't you? A. I did not.

Q. Well, what do you understand a witness to be in a document?

Q. Well, you are supposed to see a document signed.

Q. And you did not see it? A. I did not.

Q. And you knew he did not sign when you signed? A. I knew it.

Q. And you knew you were guaranteeing a satisfactory job?

MR'S FOX. O. I wouldn't say that.

MR. DEMPSEY: I object to Mr. Fox remarks.

The Court: Don't you know that is what it was if your testimony is true here? You are testifying to a signature that you did not see and you did not know.

Q. Yes, your Honor.

Q. Is that what happened? A. Just to secure an application.

Q. To submit to some other company, wasn't it? A. Yes, sir.
Q. Yes, as an indemnity bond? A. Yes, sir.
Q. Well, what was the effect of it? Was it not to fool the other company, whatever company they took it to?

Mr. Reinecker: Now, if your Honor please, the bond had already been written and the evidence shows -

Mr. Kealy: The evidence does not show any such thing.

Mr. Reinecker: I am going to object to all of these questions asked by the Court and I am going to ask the jury to disregard them, because I don't think it proper, especially coming from the Court in that light.

The Court: Here is this man in business in Chicago twenty-four years, coming and testifying to an absolute falsehood that is obvious in itself.

Mr. Reinecker: I object to that and ask that the jury be ordered to disregard it, because it is highly improper. This man comes in here, simply testifying he signed as a witness, a document for the purpose of completing it and sending it to a surety company, after William V. Meier signed it."

And, again, the defendant called our attention to the remarks of the court during the examination of the witness Karl D. Norris, called on behalf of the plaintiff, as follows:

"Mr. Cooke: The question of your Honor was as to who employed the Twin City Plumbing Company. I assume he supervised it, but they were employed to do it.

Mr. Kealy: The Twin City Plumbing Company did the work for the Elks Realty or the Inland Engineering Company.

Mr. Cooke: I object to that. That is a conclusion and that is an ultimate fact for this jury to say.

The Court: If you know, who employed the Twin City Plumbing Company to do the work, tell us."

Complaint is also made by the defendant that during the examination of the same witness, the following occurred:

"Exception.
Mr. Cooke: And for the further reason, if the Court please, there has not been shown here there were any unpaid bills, nothing in this record now tending to show it.

The Court: They are trying to show it as hard as they can.

Mr. Cooke: Well, now, I object to the statement of the Court, This is a matter for the jury, and that indicates the

Q. To docket to some other company, wasn't it? A. Yes, sir.
Q. Yes, on an indemnity bond? A. Yes, sir.
Q. Well, this was the other of it, she is not to look the other document, whatever company they took it for

MR. McKEEVER: Mr. if your Honor please, the bond has already been taken and the witness stone -

MR. EARLY: The evidence does not show any such thing.

MR. McKEEVER: I am going to object to all of those questions going to the bonds and I do joind to the jury to disregard them, believe I don't think it proper, especially coming from the Court in that light.

The Court: Here is this man in business in Oklahoma City- four years, coming and testifying to an absolute falsehood that is obvious in itself.

MR. McKEEVER: I object to that and ask that the jury be instructed to disregard it, because it is highly improper. This not come in here, simply testifying be signed as a witness, a document for the purpose of complicating it and making it a county company, after saying I. Baker signed it.

And, again, the defendant called our attention to the remarks of the court during the examination of the witness Ewt G. Hurtis, called on behalf of the plaintiff, as follows:

"Mr. Jones: The questions of your Honor was as to who employed the Twin City Plumbing Company. I assume he employed it, but they were employed to do it.

MR. Early: The Twin City Plumbing Company did the work for the Alma Laundry or the Island Engineering Company.

Mr. Jones: I object to that. That is a conclusion and that is an attempt to put this jury to say.

The Court: If you know, who employed the Twin City Plumbing Company to do the work, tell us."

Complaint is also made by the defendant that during the examination of the same witness, the following occurred:

"Exception.
Mr. Jones: And for the further reason, if the Court please, there has not been shown that there was any unpaid bill, nothing in this record was handing to show it.

The Court: They are trying to show it as hard as they can.

Mr. Cooper: Well, now, I object to the statement of the Court. This is a matter for the jury, and that indicates the

Court's view upon an ultimate fact here.

The Court: You are bound to get error in this record. I will give you all the chance you want. Your objection is overruled. Proceed.

Mr. Cooke: I object to the latest statement of the Court.

The Court: All right, keep on objecting.

Exception."

It is urged that from the remarks called to the Court's attention the defendant did not have a fair trial, and that they were prejudicial to the defendant who produced the witness, Opelka as was also the criticism of the conduct of his attorney, so that the verdict returned was not a fair verdict.

The plaintiff's reply to this contention is that there was no excuse whatever for any of the testimony offered by the witness Opelka; that the colloquy complained of between the court and the witness Opelka was not prejudicial to the defendant, and further that the tactics of defendant's counsel upon the trial of constant and repeated objections were obviously intended for the purpose of vexing the trial court and confusing the jury.

Both parties to this litigation rely upon the decision of the Supreme Court in the case of Dunn v. The People, 172 Ill. 582, in which the court says:

> "In Dunn v. People, 172 Ill. 582, the court, in considering somewhat similar action by the trial judge, made use of the following language:
> 'Though at times the court may, by an opportune and carefully considered question, elucidate a point, aid an embarrassed witness or facilitate the progress of a trial, without in any degree influencing the jury or arousing distrust in the minds of the parties or their attorneys, yet the examination of witnesses is the more appropriate function of counsel, and it is believed the instances are rare and the conditions exceptional in a high degree, which will justify the presiding judge in entering upon and conducting an extended examination of a witness, and that the exercise of a sound discretion will seldom deem such action necessary or advisable. ' "

This ruling of the Supreme Court is pertinent in this case. While a trial judge should, and it is his duty, by careful

Court's view upon an ultimate fact here.

The Court: You are bound to put error in the record. I will give you all the chance you want. Your objection is overruled. Proceed.

Mr. Gunter: I object to the learned statement of the Court.

The Court: All right, any on objection.

Exception.

It is urged that from the remarks making to the Court's attention the defendant did not have a fair trial, and that they were prejudicial to the defendant who produced the witness,Qualls as was also the criticism of the conduct of his attorney, so that the verdict returned was not a fair verdict.

The plaintiff's reply to this contention is that there was no course whatever for any of the testimony offered by the witness Qualls; that the colloquy complained of between the court and the witness Qualls was not prejudicial to the defendant, and further that the treatise of defendant's counsel upon the trial of contract and expected objections were eminently adapted for the purpose of misling the trial court and confusing the jury.

Both parties in their briefs rely upon the decision of the Supreme Court in the case of Jones v. The State, 172 Ill. 347, in which the court said:

"In Jones v. People, 172 Ill. 269, the court, in considering somewhat similar action by the trial judge, made use of the following language:

'Though at times the court may, by an expression and certainly considered question, mislead or a point, act as misunderstand witness or facilitate the progress of a trial, without in any degree influencing the jury or arousing distrust in the minds of the parties or their attorneys, yet the consideration of attention to the same appreciable function of counsel, and it is believed the instances are rare and the conditions exceptional in a high degree, which will justify the presiding judge in entering upon and conducting an extended examining of a witness, and that the exercise of a sound discretion will rather deem such action unnecessary or advisable.' "

This ruling of the Supreme Court is pertinent in this case. While a trial judge should, and it is his duty, by careful

questions put to a witness to clear up facts that appear to be confused and which would facilitate the progress of a trial, still it is not his duty to criticise the testimony of a witness by the use of such words as "a confidence game", and "absolute falsehood", which appears to have been done in the instant case and no doubt influenced and created a distrust in the minds of the jury, which affected their judgment in passing upon the rights of the defendant. The attitude of the judge should be such that the jury will not be influenced by anything said by him in their presence during the trial. Sometimes a trial judge is sorely tried, and he may be vexed by the conduct of counsel, or a witness, still he should only in the absence of the jury reprimand counsel, as well as the witness, if occasion requires. Generally, examination of witnesses is for counsel in the case, and a trial judge is never justified in conducting an extended examination of a witness. The trial judge is to pass upon objections made by the attorney offering such objections, but occasion should not arise during the trial for the court to remark in the presence of the jury, by way of criticism, that the attorney is, "bound to get error in this record", and that he is going to get a chance.

The court may, during the absence of the jury, admonish an attorney where it is plain that the objections are trivial and are made only to delay and interfere with the administration of justice, and, in a proper case, the court may punish, if an attorney so conducts himself as to interfere with a proper and orderly disposition of the trial.

Other questions have been called to the Court's attention, but in view of the conclusions we have reached, it will not be necessary to pass upon them at this time.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

WILSON, P.J. AND FRIEND, J. CONCUR.

questions put to a witness to elicit by facts that appear to be material and which could facilitate the progress of a trial, still it is not his duty to criticize the testimony of a witness by the use of such words as "a confidence game", and "abusive influence", which appears to have been done in the instant case and no doubt influenced and created a distrust in the minds of the jury, which affected their judgment in passing upon the rights of the defendant. The attitude of the judge should be such that the jury will not be influenced by anything said by him in their presence during the trial. Sometimes a trial judge is merely tried, and he may be vexed by the conduct of counsel, or a witness, still he should only in the absence of the jury reprimand counsel, as well as the witness, if occasion requires. Generally, examination of witnesses is for counsel in the trial, and a trial judge is never justified in conducting an extended examination of a witness. The trial judge is to pass upon objections made by the attorney offering such objections, but discussion should not arise during the trial for the court to remark in the presence of the jury, by way of criticism, that the attorney is, "bound to get error in this record", and that he is going to get a change.

The court may, during the absence of the jury, admonish an attorney where it is plain that the objections are trivial and are made only to delay and interfere with the administration of justice, and, in a proper case, the court may punish, if an attorney so conducts himself as to interfere with a proper and orderly disposition of the trial.

Other questions have been raised by the Court's allusion, but in view of the conclusions we have reached, it will not be necessary to pass upon them at this time.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

WILSON, P.J. AND WEBER, J. CONCUR.

34577

ERWIN E. COWEN,
Appellee,
v.
PAUL SCHULTE and EMMA SCHULTE,
Appellants.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

261 I.A. 652

Opinion filed May 13, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This is an appeal by the defendants from a judgment for the plaintiff and against the defendants in the sum of $3,927.94, entered by the court upon the verdict of the jury after overruling motions for a new trial and in arrest of judgment.

The declaration avers that on the 7th day of March, 1924, the plaintiff was desirous of purchasing a certain piece of real estate, known as The Wesley Apartments, located and situated in Oak Park, Illinois; that the defendants were or pretended to be the owners of said property, and that they entered into a contract on said date with the plaintiff, in which they agreed to convey said property to the plaintiff within a reasonable time specified in the contract, and which said contract was signed by the defendants.

The declaration further avers that although the time has long gone by since the execution of the contract, the defendants have refused and still do refuse to convey the property to the plaintiff, and that at the time of the signing of the contract, the plaintiff deposited with the defendants the sum of $3,000, to be held as earnest money by the defendants.

It is further averred that notwithstanding these facts, the defendants have refused to convey the said property and have retained said earnest money.

The defendants filed a demurrer to the declaration,

BAUTY

ERNA A. JONES,

Appellee,

v.

ELMER DOUGLAS and ZENA DOUGLAS,

Appellants.

APPEAL FROM

MARION COUNTY

Hon. Court.

Opinion filed May 15, 1931

MR. JUSTICE BARRY delivered the opinion of the court.

This is an appeal by the defendants from a judgment for the plaintiff and against the defendants in the sum of $3,817.04, entered by the court upon the verdict of the jury after overruling motions for a new trial and in arrest of judgment.

The declaration avers that on the 7th day of March, 1924, the plaintiff was desirous of purchasing a certain piece of real estate, known as the Healy Apartments, located and situated in Oak Park, Illinois; that the defendants were or pretended to be the owners of said property, and that they entered into a contract on said date with the plaintiff, in which they agreed to convey said property to the plaintiff within a reasonable time specified in the contract, and which said contract was signed by the defendants.

The declaration further avers that although the time has long gone by since the execution of the contract, the defendants have refused and still do refuse to convey the property to the plaintiff, and that at the time of the signing of the contract, the plaintiff advanced with the defendants the sum of $3,000, to be held as earnest money by the defendants.

It is further averred that notwithstanding these facts, the defendants have refused to convey the said property and have retained said earnest money.

The defendants filed a demurrer to the declaration,

which was overruled by the court, and thereafter filed a plea of the general issue to said declaration.

An order was entered that the plaintiff file a copy of the instrument sued on, which was done.

The defendants contend that R. R. Fowler, Judge of the City Court of Marion, Illinois, was not authorized by law and was without jurisdiction to preside as a judge in the Superior Court in the trial of the case now before this court, for the reason that he was not properly authorized in the manner provided for by statute. It appears that an order was entered by the Executive Committee of the Superior Court of Cook County as follows:

> "It is ordered by the Executive Committee that R. R. Fowler be and he is hereby assigned to take up the call of Judge Walter F. Steffen Common Law Calendar No. 12, in Room 939, Court House, commencing Monday, May 12, A. D. 1930, and until further order of said Committee."

The defendants admit that Judges of the several Circuit Courts of the state may interchange with each other and perform each other's duties, which applies to the City, County and Probate Courts, but not to the Superior Court of Cook County. However, this question is not a new one, and this court in the case of Beely v. Fribyl's Estate, 195 Ill. App. 314, in considering a question similar to the one we have before us, reached a conclusion contrary to defendants' contention in these words:

> "Section 245 of Chapter 37, Rev. St. (J. & A. Par. 3294), clearly seems to authorize judges of city courts to hold court for Circuit Court judges in Cook county. The section reads as follows:
> 'Such judges may, with like privileges as the judges of circuit and county courts, interchange with each other, and with the judges of circuit, superior, county and probate courts, and may hold court for each other, and for judges of circuit, superior, county and probate courts, and perform each other's duties, and the duties of judges of circuit, superior, county and probate courts, when they find it necessary or convenient.'
> In American Car & Foundry Co. v. Hill, 226 Ill. 287, it was held that under this statute a judge of a city court was qualified to preside at the trial of a cause in the Circuit Court. See also, opinion in White v. Herhold, 182 Ill. App. 477, in which this identical question was involved."

which was overruled by the court, and thereafter filed a plea of the general issue to said declaration.

An order was entered that the plaintiff file a copy of the instrument sued on, which was done.

The defendants contend that R. R. Foster, Judge of the City Court of Anniston, Illinois, was not authorized by law and was without jurisdiction to preside as judge in the Superior Court in the trial of the case now before this court, for the reason that he was not properly authorized in the manner provided for by statute. It appears that an order was entered by the Executive Committee of the Superior Court of Cook County as follows:

> "It is ordered by the Executive Committee that R. R. Foster be and he hereby assigned to take on the call of Judge Potter [illegible] Courtroom the Criminal Ex. 12, in room 400, Court House, commencing Monday, May 12, [illegible], 1930, and until further order of said Committee."

The defendants admit that judges of the several circuit courts of the state may interchange with each other and perform each other's duties, which applies to the City, County and Probate Courts, but not to the Superior Court of Cook County. However, this question is not a new one, and this court in the case of Yancey v. Kinney's Estate, 180 Ill. App. 224, in considering a question similar to the one we have before us, reached a conclusion contrary to defendants' contention in these words:

> "Section 261 of Chapter 37, Rev. St. (J. S. Ann. 1924), clearly gives to municipal judges of city courts to hold court for circuit court judges in each county. The section reads as follows:
>
> 'Such judges may, with like privileges as the judges of circuit and county courts, interchange with each other, and with the judges of circuit, superior, county and probate courts, and may hold court for each other, and for judges of circuit, superior, county and probate courts, and courts such other's duties, and the duties of judges of circuit, superior, county and probate courts, who that find it necessary or convenient.'
>
> In Bartlett v. Powers, 3, Ill. App. 100 Ill. 107, it was held that under this statute a judge of a city court was qualified to preside at the trial of a cause in the circuit court. See also, opinion in White v. Bartlett, 182 Ill. App. 477, in which this identical question was involved."

The plaqita in the instant case is in the same form as that passed upon by this court in Lesely v. Fribyl, supra, and the court cites as authority for its conclusion the Supreme Court in the case of Reitz v. People, 77 Ill. 518. No question, however, is raised by the defendants in this case as to the form.

From the record, we are inclined to follow the opinion of this court in the Fribyl case, and hold that the judge presiding at the trial of the case now before us on appeal, was properly authorized by the statute and presided at the request of the judges of the Superior Court of Cook County.

It is urged that the declaration does not state a cause of action. It appears from the record that the defendants filed a demurrer to the declaration, which was overruled, and thereafter filed a plea of the general issue. The general rule is that pleading over to the merits after the overruling of a demurrer will waive a defective statement of a good cause of action, and admit the sufficiency of the declaration. Wolf v. Powers, 241 Ill. 9. A further rule is that before judgment, the declaration is to be strictly construed against the pleader, and that after judgment the pleading upon which it is based is to be liberally construed to sustain the judgment. Smith v. Butledge, 332 Ill. 180; Roumbos v. City of Chicago, 332 Ill.70.

For the purposes of this case the declaration is sufficient to sustain the verdict. An action in assumpsit will lie to recover money obtained by the defendant from the plaintiff, which in equity and good conscience the defendant has no right to retain, and in such case the law implies a promise to pay. Greenwood v. Thompson Co., 212 Ill. App. 371, Stewart v. Brady, 300 Ill. 445. And this is implied by law in the event of default on the part of the defendant, although the defendant did not make an express promise.

The next point urged by the defendants is that the plaintiff erred in not filing a bill on the equity side of the court

The ruling in the instant case is in the same form as that passed upon by this court in Martin v. Lyons, supra, and the court cites as authority for its dismissal the Supreme Court in the case of Ogden v. Jones, 77 Ill. 618. No question, however, is raised by the defendants in this case as to the form.

Upon the record, we are inclined to follow the opinion of this court in the Ruhl case. And hold that the judge presiding at the trial of the case now before us on appeal, was properly restrained by the exercise and jurisdiction of the judges of the superior court of Cook County.

It is urged that the declaration does not state a cause of action. It appears from the record that the defendants filed a demurrer to the declaration, which was overruled, and thereupon filed a plea of the general issue. The general rule is that pleading over to the merits after the overruling of a demurrer will waive a substantive statement of a good cause of action, and admit the sufficiency of the declaration. Vail v. Conner, 141 Ill. 8. A further rule is that before judgment, the declaration is to be strictly construed against the pleader, and that after judgment the pleading upon which it is based is to be liberally construed to sustain the judgment. Smith v. Jackson, 101 Ill. 137; Cummins v. Life of Children, 201 Ill. 75.

For the purposes of this case the declaration is sufficient to sustain the verdict. An action in assumpsit will lie to recover money obtained by the defendant from the plaintiff, when in equity and good conscience the defendant has no right to retain, and is such that the duties a jurisdiction of law. Pritchard v. Thompson, 131 Ill. 239, 244; Stewart v. Jones, 201 Ill. 468. And this is implied by law in the event of default on the part of the defendant, although the defendant did not make an express promise.

The next point urged by the defendants is that the plaintiff erred in not filing a bill on the equity side of the court

for recission of the contract, on the ground of misrepresentation.

Plaintiff answers this contention by stating that the plaintiff's suit is brought upon a contract which is in full force and effect, and which was breached by the defendants, and that the plaintiff is merely seeking the return of his money because of the failure of the defendants to fulfill the terms of this agreement. The record sustains this contention.

The contract is dated March 7, 1924. Suit was filed by the plaintiff on January 10, 1927, and a trial was had on May 12, 1930. The record is silent as to any offer made by the defendants to perform at any time. It may be that the plaintiff had a choice of remedies, but he elected to sue in assumpsit, and for the reasons indicated by the court, this was a proper action under the facts in evidence.

The defendants complain that the court erred in permitting the plaintiff, over objection, to introduce evidence of conversations that were had prior to the making of the contract. The contract involved in this litigation required the defendants to furnish the plaintiff a guarantee policy or a Certificate of Title from the registrar of titles within a reasonable time, and what is a reasonable time is to be determined from the surrounding circumstances and the expression of the contract itself. Upon the margin of the contract the following is written:

> "This contract to be consummated within 30 days after lawsuit now pending before Humphrey (Master) is disposed. In case vendor shall be unable to deliver premises on account of said lawsuit then in that case said vendor shall not be liable for commission."

This memorandum is not signed by the parties, and is not embraced in the body of the contract. The rule is that all conversations prior to or at the time of the execution of a written contract are merged in the agreement, and that parol evidence is not

for rescission of the contract, on the ground of misrepresentation.

Plaintiff answers this contention by stating that the plaintiff's suit is brought upon a contract which is in full force and effect, and which was breached by the defendants, and that the plaintiff is merely seeking the return of his money because of the failure of the defendants to fulfill the terms of this agreement. The record sustains this contention.

The contract is dated March 7, 1964. Suit was filed by the plaintiff on January 13, 1967, and a trial was had on May 12, 1970. The record is silent as to any offer made by the defendants to perform at any time. It may be that the plaintiff had a claim of remedies, but he elected to sue in assumpsit, and for the reasons indicated by the court, this was a proper action under the facts in evidence.

The defendants complain that the court erred in permitting the plaintiff, over objection, to introduce evidence of conversations that were had prior to the making of the contract. The contract involved in this litigation requires the defendants to furnish the plaintiff a guarantee policy or a certificate of title from the registrar of titles within a reasonable time, and what is a reasonable time is to be determined from the surrounding circumstances and the consideration of the contract itself. Upon the margin of the contract the following is written:

> "Title contract is to commence within 30 days after issuance and passing Sanitary (Health) is discovered. In case vendee shall be unable to believe premises on account of said lawsuit then in that case said vendor shall not be liable for commission."

This memorandum is not signed by the parties, and is not endorsed in the body of the contract. The rule is that all conversations prior to or at the time of the execution of a written contract are merged in the agreement, and that parol evidence is not

permissible to alter or vary the terms of the contract, except in case of ambiguity, where a resort to parol evidence is necessary, not for the purpose of altering or changing the contract but in order to ascertain the true meaning of the parties. This rule applies to all actions, whether in law or equity. It is also a rule that words of doubtful construction are to be construed strictly against the party using them. In this case, the defendant Paul Schulte testified, in part, as follows:

> "Then they drew up the contract. Mr Nagle then drew up the contract and I made them put that on the contract. I don't want any trouble because I could not deliver the title until the case was out of Court."

which evidence would seem to indicate that the language on the margin of the contract is the language of the defendants. The marginal note does not disclose the nature of the lawsuit that was pending before the Master in Chancery. Evidence that the defendants stated at the time that the action before the Master was a mechanic's lien suit, was competent, and so was the evidence of the witness Nagle that he wrote the marginal note at the request of Paul Schulte, one of the defendants. However, the evidence of Nagle that it was stated to him by Mr. Schulte that if he were not successful in the lawsuit he did not want to pay the brokers a comsission, is not reversible error, for it does not vary, change or contradict the terms of the writing.

Complaint is made that upon the trial, the court, during the examination of the witness Paul Schulte, one of the defendants, required him to answer the question, "Are you willing to give back the money?" which was objected to, and the court, in the presence of the jury, remarked as follows: "The client has a right to do as he pleases, the lawyer don't amount to anything, it is all what the client wants to do. If he wants to give that back he has a right to do it regardless of the fact that you represent him.

permissible to alter or vary the terms of the contract, except in case of ambiguity, where a resort to parol evidence is necessary, not for the purpose of altering or changing the contract but in order to ascertain the true meaning of the parties. This rule applies to all actions, whether in law or equity. It is also a rule that words of doubtful construction are to be construed strictly against the party using them. In this case, the defendant had contracted to pay, in part, as follows:

> "Then they drew up the contract. My single item drew up the contract and I made them put that on the contract. I don't want any trouble because I would not deliver the pipe until the work was put of order."

which evidence would seem to indicate that the language on the margin of the contract is the language of the defendants. The marginal note does not disclose the nature of the lawsuit that was pending before the master in chancery. Evidence that the defendants stated at the time that the action before the master was a mechanic's lien suit, was competent, and so was the evidence of the witness Hagle that he wrote the marginal note at the request of Paul Schulte, one of the defendants. However, the evidence of Hagle that it was stated to him by Mr. Schulte that if he were not successful in the lawsuit he did not want to pay the brokers a commission, is not reversible error, for it does not vary, change or contradict the terms of the writing.

Complaint is made that upon the trial, the court, having the examination of the witness Paul Schulte, one of the defendants, requested him to answer the question, "Are you willing to give back the money?" which was objected to, and the court, in the presence of the jury, remarked as follows: "The client has a right to do as he pleases, the lawyer don't amount to anything, it is all what the client wants to do. If he wants to give that back he has a right to do it regardless of the fact that you represent him.

He has got a right to say if he wants to say so."

It is suggested that the statement of the court was prejudicial. The same witness, however, testified, in answer to a question, that "He (meaning the plaintiff) never asked me for his money back. He never asked me to deliver some evidence of the title. The title is in the Torrens office." He further testified that the plaintiff blackmailed the defendant. The court permitted the defendant, Paul Schulte, to give an explanation of what was meant by "blackmail," which was not objected to by the plaintiff, and thereby afforded the witness an opportunity to explain his refusal to carry out the terms of the contract or to return the money. The Court's statement did not create prejudice in the minds of the jury, but on the contrary indicated in the presence of the jury the fairness of the Court in permitting the defendant Schulte to testify to the use of the word "blackmail", and the remarks of the Court, in view of the record, were not prejudicial to the defendants.

Interest was allowed by the jury in computation of the amount due the plaintiff. The only complaint made is that the Court, in its instruction, fixed the date of the deposit of the money from which to compute interest if the jury found the issues for the plaintiff which was reversible error, for the reason that interest may be allowed only as provided for by Section 2 of Chapter 74 of Smith-Hurd's Statutes of Illinois.

The rule is that interest may be allowed where property or money is wrongfully withheld after demand. In this case the plaintiff is entitled to interest for the reason that the record discloses that he made a demand for his money. Parties are specially liable where money is withheld by an unreasonable and vexatious delay of payment, which according to the record appears to have been done in this case. The trial court, in view of the record, was amply justified

he has got a right to say if he wants to say so."

It is suggested that the statements of the court are prejudicial. The mere witness, however, testified, in answer to a question, that "he (meaning the plaintiff) never asked me for his money back. He never asked me to deliver some evidence of the title. The title is in the Torrens office." He further testified that the plaintiff misrepresentedthe Attorney. The court instructed the defendant, Paul Dabuzio, to give an explanation of what was meant by "Blackmail," which was not rejected by the plaintiff, and thereby afforded the witness an opportunity to explain his refusal to carry out the terms of the contract or to return the money. The Court's statement did not create prejudice in the minds of the jury, but on the contrary initiated in the presence of the jury the fairness of the court in permitting the defendant Dabuzio to testify to the use of the word "blackmail", and the remarks of the Court, in view of the record, were not prejudicial to the defendants.

Interest was allowed by the jury in computation of the damage the plaintiff. The only complaint made is that the Court, in its instruction, fixed the date of the deposit of the money from which to compute interest if the jury found the issues for the plaintiff which was reversible error, for the reason that interest may be allowed only as provided for by Section 2 of Chapter 74 of Smith-Hurd's Statutes of Illinois.

The rule is that interest may be allowed where property or money is wrongfully withheld after demand. In this case the plaintiff is entitled to interest for the reason that the record discloses that he made a demand for his money. Parties are specially liable where money is withheld by an unreasonable and vexatious delay of payment, which according to the record appears to have been done in this case. The trial court, in view of the record, was fully justified

in refusing a new trial, and in entering a judgment for the amount of the verdict, and we believe that substantial justice has been done, and that there is no reversible error in the record that would warrant a reversal.

JUDGMENT AFFIRMED.

WILSON, PJ. AND FRIEND, J. CONCUR.

in studying a new title, and in reviving a judgment for the amount of the mortgage, and we believe that substantial justice has been done, and that there is no meritorious error in the record that would warrant a reversal.

FURNISH DISTRICT.

ELDRIDGE, ET. AL. VS. PERRIN, 3. CONDEMN.

35190

PEOPLE OF THE STATE OF ILLINOIS, ex rel, OSCAR NELSON, as Auditor of Public Accounts of the State of Illinois,	APPEAL FROM
(Complainant below),	INTERLOCUTORY ORDER
CHICAGO TRUST COMPANY, Receiver of ROOSEVELT-BANKERS STATE BANK,	ENTERED IN THE
(Petitioner below),	SUPERIOR COURT
Appellee,	
v.	
SUPREME LIBERTY LIFE INSURANCE COMPANY, a Corporation, and DAVID MANSON,	OF COOK COUNTY.
(Respondents below),	
Appellants.	

261 I.A. 652

Opinion filed May 13, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This is an appeal by the Supreme Liberty Life Insurance company and David Manson, respondents to the petition filed by the Chicago Trust Company of Chicago, as receiver, wherein an interlocutory order of injunction was entered on January 24, 1931.

It appears from the record that on August 18, 1930, Oscar Nelson, as Auditor of Public Accounts of the State of Illinois, ex rel the People of the State of Illinois, filed a bill to dissolve the Roosevelt-Bankers State Bank, a banking corporation organized under the laws of the State of Illinois; that prior to that date, on August 2, 1930, said Auditor of Public Accounts appointed the Chicago Trust Company, of Chicago, as receiver for said Roosevelt-Bankers State Bank, and said receiver thereafter qualified by giving bond in the sum of $100,000; that on August 19, 1930, an order was entered by the trial court confirming all the acts of the Auditor of Public Accounts and authorizing the Chicago Trust Company, as receiver, to collect all the debts, dues and demands belonging to the Roosevelt-Bankers State Bank; that

Opinion filed May 13, 1931

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal by the Supreme Liberty Life Insurance company and David Benson, respondents to the petition filed by the Chicago Trust Company of Chicago, as trustee, charging an injunctory order of injunction was entered on January 24, 1931.

It appears from the record that on August 18, 1930, Oscar Nelson, as Auditor of Public Accounts of the State of Illinois, on his the people of the State of Illinois, filed a bill to dissolve the Roosevelt-Sanders Trust Bank, a banking corporation organized under the laws of the State of Illinois; that prior to that date, on August 8, 1930, said Auditor of Public Accounts appointed the Chicago Trust Company, of Chicago, as receiver for said Roosevelt-Sanders State Bank, and said receiver thereafter qualified by giving bond in the sum of $150,000; that on August 18, 1930, an order was entered by the trial court confirming all the acts of the Auditor of Public Accounts and authorizing the Chicago Trust Company, as receiver, to collect all the debts, dues and demands belonging to the Roosevelt-Sanders State Bank; that

On January 24, 1931, the Chicago Trust Company, as receiver for the Roosevelt-Bankers State Bank, filed a verified petition in the same proceeding praying that the Supreme Liberty Life Insurance Company and David Manson, respondents named in said petition, answer said petition within the number of days to be determined by the court, and that they account for and pay over all the sums of money growing out of a certain commission contract, and that a temporary injunction issue immediately, and without bond, restraining and enjoining said Supreme Liberty Life Insurance Company from paying over certain renewal commissions from month to month to said David Manson, respondent.

It further appears from the petition filed in the above entitled cause that the petitioner, as receiver, obtained judgments against the Liberty Foundation Finance Corporation and the Liberty Underwriters Company, Inc. but that neither of said companies has property or assets out of which said judgments, or either of them, can be satisfied, with the exception of the collateral to the notes of said Underwriters Company, which is of little value.

It further appears from the petition filed herein that the Insurance Company was obligated to pay the Liberty Underwriters Commissions aggregating $1,300 per month; that at the time the Underwriters procured the loan from the Roosevelt-Bankers State Bank it was agreed by said Liberty Underwriters and the said Insurance Company, with one Alexander Flower for said bank, that the commissions heretofore referred to should be assigned to Edward Kallish as trustee by said Insurance Company, and that said trustee should in turn pay said commissions to said Flower, to be by him credited on the note of said Underwriters, now in the possession of the receiver; that said payments were made in accordance with said agreement, until December, 1929, at which time it is alleged that Alexander Flower became indebted to said Insurance Company in the sum of $23,000, and that the said

On January 14, 1911, the Chicago Title Company, as trustee for the Inverness-Hunters Creek Bank, filed a verified petition in the case proceeding praying that the Supreme Liberty Life Insurance Company and Noah Glover, respondents named in said petition, answer said petition within the number of days to be determined by the court, and that they account for and pay over all the sums of money growing out of a certain commission contract, and that a temporary injunction issue immediately, and without bond, restraining and enjoining said Supreme Liberty Life Insurance Company from paying over certain renewal commissions from month to month to said David Edwards, respondent.

It further appears from the petition filed in the above entitled cause that the petitioner, as receiver, obtained judgments against the Liberty Insurance Company, Virginia Corporation and the Liberty Underwriters Company, Inc. but that neither of said companies has property or assets out of which said judgments, or either of them, can be satisfied, with the exception of the collateral to the notes of said Underwriters Company, which is of little value.

It further appears from the petition filed herein that the Inverness Company was obligated to pay the Liberty Underwriters commissions aggregating $1,500 per month; that at the time the Underwriters procured the loan from the Roosevelt-Hunters State Bank it was agreed by said Liberty Underwriters and the said Inverness Company, with no intention ever to pay it, that the commissions heretofore referred to should be assigned to Edward Hallion as trustee by said Inverness Company, and that said trustee should in turn pay said commissions to said Glover, to be by him credited on the note of said Underwriters, now in the possession of the receiver; that said Supreme Life was in collusion with said Glover; that Edward Hallion, on which time it is alleged that Glover became indebted to said Inverness Company in the sum of $20,000, and that the said

Kallish, Flower, and the Insurance Company agreed that the said monthly commissions should thereafter be retained by said Insurance Company and applied as monthly credits upon the indebtedness of said Flower to said Insurance Company; that said Insurance Company diverted to its own use, by way of credits upon the note of said Alexander Flower to it the sum of approximately $1300 each month; that on October 15, 1930, the said Insurance Company purported to sell, transfer and deliver the note of said Alexander Flower to one David Manson, a director of said Insurance Company, and that since October 15, 1930, said Insurance Company has been paying said commissions monthly to said Manson to be applied upon the note of said Flower.

It further appears that it is the opinion of the receiver that the transaction between the parties named was fraudulent and for the purpose of benefitting Flower and defrauding the Roosevelt-Bankers State Bank.

Thereafter, on January 24, 1931, without notice and without bond, the court entered an order enjoining and restraining, until the further order of the court, the Supreme Liberty Insurance Company, its officers, agents, servants, attorneys and solicitors, from making any payments to David Manson upon the note of Alexander Flower, sold by the Supreme Liberty Life Insurance Company to the said Manson, or any payments to said Davis Manson upon a certain renewal contract sold and delivered to him by the Supreme Liberty Life Insurance Company as collateral to Alexander Flower's note.

It is elementary that a court, in order to grant the relief prayed for in a bill or cross-bill filed in chancery, must have jurisdiction of the subject matter and of the parties, and the parties to the litigation should be properly in court, for it is axiomatic that the parties should have a day in court, and no decree can be entered in a suit in which the parties are not before the court. Shriver v. Day, 276 Ill. 403.

civilly, Flower, and the Insurance Company agreed that the said monthly commissions should thereafter be retained by said Insurance Company and applied as credit accts upon the indebtedness of said Flower to said Insurance Company; that said Insurance Company directed to the one one, by way of credits upon the note of said Alexander Flower to it the sum of approximately $120.00 each month; that on October 16, 1920, the said Insurance Company returned to said Trowler and delivered the note of said Alexander Flower to the said Hanson, a director of said Insurance Company, and that since October 15, 1920, said Insurance Company has been paying said commissions monthly to said Hanson to be applied upon the note of said Flower.

It further appears that it is the opinion of the trustee that the Insurance Company the parties named the Trowlers and for the purpose of bamboozling Flower and defrauding the Insurance-Company that's same.

Therefore, on January 24, 1921, without notice and without bond, the court entered an order enjoining and restraining, until the further order of the court, the Supreme Liberty Insurance Company, its officers, agents, servants, attorneys and solicitors, from making any payments to David Hanson upon the note of Alexander Flower, said by the Supreme Liberty Life Insurance Company to the said Hanson, or any payments to said David Hanson upon a certain renewal contract said not delivered to him by the Supreme Liberty Life Insurance Company as collateral to Alexander Flower's note.

It is elementary that a court, in order to grant the final decree for in a suit or cross-suit filed in chancery, must have jurisdiction of the subject matter and of the parties, and the parties to the litigation should be primarily in court, for it is axiomatic that the parties should have a day in court, and no decree can be entered in a suit in which the parties are not before the court.

<u>Bartlett v. Hay</u>, 276 Ill. 402.

In the petition filed by the receiver in the instant case, there is not incorporated a prayer for the issuance of process to bring the respondents before the court. The only request made in the petition is that the respondents be ruled by the court to answer the petition within a day to be fixed.

The order entered by the court to the effect that the Supreme Liberty Life Insurance Company and David Manson make answer to the petition within ten days from the date of the filing of the receiver's petition, did not bring the respondents into court, and the court was without jurisdiction to enter a default for failure to answer as directed in the court's order, and, therefore, could not proceed to determine the issues as between the parties.

It is generally the rule that an injunction will only issue upon a bill or cross-bill upon proper charges and in a proper cause, but when a court of equity is already in possession of a cause and has jurisdiction of both the subject-matter and of the parties, it may enforce obedience to its mandate by an injunction issued merely upon the petition in the cause, without the filing of a bill. Western Cottage Piano & Organ Co. v. Burrows, 144 Ill. App.350.

We do not agree with the contention of the respondents that their rights may not be determined, as set forth in the petition, for the reason that they are not parties to the original suit. The court undoubtedly had jurisdiction of the subject-matter, that is, the assets of the estate of the defendant; and the purpose of the litigation is to wind up the affairs of the bank and collect the assets for that purpose and in a proper case the court may determine the rights of the parties upon that question.

"A receiver with the power and under the duty to collect assets may move for an order on a party to the suit who has interferred with his possession by collecting assets since the appointment, and may proceed summarily by petition for a rule to show cause in the court by which he was appointed to require one not a party to the suit to pay over money belonging to the receivership which

In the petition filed by the receiver in the instant case, there is not incorporated a prayer for the issuance of process to bring the respondents before the court. The only request made in the petition is that the respondents be ruled by the court to answer the petition within a day to be fixed.

The order entered by the court to the effect that the Express Liberty Life Insurance Company had twenty days with answer to the petition within ten days from the date of the filing of the receiver's petition, did not bring the respondents into court, and the court was without jurisdiction to enter a default for failure to answer as directed in the court's order, and, therefore, could not proceed to determine the issues as between the parties.

It is generally the rule that an injunction will only issue upon a bill or cross-bill upon proper showing and in a proper cause, but when a court of equity is already in possession of a cause and has jurisdiction of both the subject-matter and of the parties, it may entertain obedience to its mandate by an injunction issued merely upon the petition in the cause, without the filing of a bill. Central Union Life & Trust Co. v. Bulkley, 144 Ala. 366. 111.

We do not agree with the contention of the respondents that their rights may not be determined, as set forth in the petition, for the reason that they are not parties to the original suit. The court undoubtedly had jurisdiction of the subject-matter, that is, the cause or the matter of the defend at; and the purpose of the litigation is to wind up the affairs of the bank and collect the amounts for this purpose and in a proper case the court may determine the rights of the parties upon that question.

"A receiver sits the great dog under the duty to collect assets wherever may lie in order on a party to the suit who has interfered with the possession by collecting assets upon the receivership, and has proceed summarily by petition for a rule to show cause in the court by which he was appointed to require one not a party to the suit to pay over money belonging to the receivership which

has come into possession of the respondent since the appointment of the receiver." 34 Ency. of L. and P. 375.

It appears from the petition that the Supreme Liberty Insurance Company, Flower, and Kallish agreed that insurance premiums amounting to about $1300 a month were to be applied by the Insurance Company to the reduction of an indebtedness of Flower, who was a director of the Roosevelt-Bankers State Bank. This sum was, by previous agreement with the Supreme Liberty Insurance Company applied to the reduction of the Liberty Underwriters Loan, a part of the assets of the defendant bank.

The petition charges a conspiracy to deprive the defendant bank of this money by the agreement made with Flower, while an officer of the bank, and the Insurance Company, and that in order to carry out said conspiracy, the Flower note in possession of the Insurance Company was assigned and transferred to one Manson, who was a director of the respondent Insurance Company. Accordingly, if the parties are properly before the court, the court may pass upon the question as to whether the parties entered into a conspiracy to defraud the bank of its assets, and may compel the parties to account to the receiver.

From the fact that these respondents were not properly before the court, the court had no jurisdiction over the parties, and from the fact that this court, as the record now stands, is unable to determine the questions involved, and also because of failure to give notice of the application for this temporary injunction, the court was without jurisdiction to enter the interlocutory order appealed.from.

It was surprising to this court when it examined the record to find that the receiver had filed its appearance, but had failed to file a brief. It would seem, in fairness to the trial court, as well as to the estate it represented, that it should at

has been into possession of the insolvent since the appointment of the receiver." 24 Ohio, at p. 124 i. fin.

It appears from the petition that the Dayton Liberty Insurance Company, Limer, and Zellick stated that insurance premiums amounting to about $1200 a month were to be supplied by the Insurance Company on the solicitation of Limer, who was a director of the Insurance Company and a stockholder in the bank. This was, by previous agreement with the Dayton Liberty Insurance Company applied to the reduction of the Liberty Underwriters loan, a part of the assets of the defendant bank.

The petition charges a conspiracy to injure the defendant bank of this money by the agreement made with Limer, while an officer of the bank, and the Insurance Company, and that in order to carry out said conspiracy, the Limer made an assignment of the Insurance Company was assigned and transferred to one Zellick, who was a director of the respondent Insurance Company. Incidentally, if the parties are properly before the court, the court may pass upon the question as to whether the parties entered into a conspiracy to defraud the bank of its assets, and may compel the parties to account to the receiver.

From the fact that these respondents were not properly before the court, the court had no jurisdiction over the parties, and from the fact that this court, as the record now stands, is unable to determine the questions involved, and also because of failure to give notice of the application for this temporary injunction, the court was without jurisdiction to enter the interlocutory order appealed from.

It was suggested to this court that if assumes the record to find that the receiver had filed its appearance, but had failed to file a brief. It would seem, in fairness to the trial court, as well as to the estate it represents, that it should at

least have filed a brief, in order that this court might have such aid as a receiver could give.

For the reasons indicated, the interlocutory order entered by the court, granting a temporary injunction, is reversed and the costs assessed against the receiver.

REVERSED.

WILSON, P.J. AND FRIEND, J. CONCUR.

Jesus Juan Ziles a Julio, le dabis ebi Ziles quod algi Juan quod ali de a ranaiko mesi Ziles.

Jus ibi ennemi Zilisiko, ibi inkatunoko unde mahiset ki ibi inari, ranaiko a bunaiko ichuniko, ki kenisset and ibi mais ennemi ingiset ibi ranaiko.

Zilisiko.

ETAPOS, 1.1. ISI ZILISI I. ZIMIKO.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 9777 Agenda 25.

W. J. SAVAGE,

Plaintiff in Error

vs. Error to the Circuit Court

F. J. KEATING, of La Salle County.

Defendant in Error

Jett, P. J.

W. J. Savage, plaintiff in error, instituted this suit before a justice of the peace against E. T. Keating and F. J. Keating, doing business as Keating and Son, and the Universal Key Registry and Insurance Association, Limited, to recover $25.50 alleged to have been paid to Keating & Son as premium on a certain insurance policy upon what was known as Del Monte Gardens of which the plaintiff in error was receiver. On the trial before the justice of the peace a judgment was rendered against E. T. Keating and F. J. Keating for the said sum of $69.50, together with costs of suit. An appeal was prosecuted to the Circuit Court and before the trial in that Court, E. T. Keating departed this life. In the Circuit Court a jury was waived. The suit was dismissed as to E. T. Keating and the Universal Key Registry Association, Limited. The trial proceeded against F. J. Keating, defendant in error. The Court found for the defendant in error and this writ of error was sued out by plaintiff in error.

It appears that W. J. Savage, plaintiff in error, receiver was desirous of obtaining insurance on the buildings which belonged to the Del Monte Gardens. The hazard in the insurance of buildings such as those for which plaintiff in error was receiver was considered so great that but few companies would write policies of insurance thereon. Plaintiff in error spoke to Keating & Keating who did quite an insurance business about obtaining insurance and Keating replied that he represented no companies which could accept the risk. Keating had received a circular from the Universal

Judgment No. 177 Judge ---.

E. L. Barton.

Plaintiff in Error

vs.

No.

F. L. Smith et al.,

Defendant in Error.

Error to the Circuit Court of Los Angeles County.

Left, J. ---.

E. L. Barton, plaintiff in error, instituted this suit before a justice of the peace against F. Y. Harding and F. L. Smith, doing business as Harding and Son, and the Universal Fire Extinguisher Insurance Association, Limited, to recover $20.00 alleged to have been paid to Harding & Son on premiums on a certain insurance policy upon which was known as the Hotel Stone Building of which the plaintiff in error was receiver. On the trial before the justice of the peace a judgment was rendered against E. Y. Harding and F. L. Harding for the sum of $20.00, together with costs of suit. An appeal was prosecuted to the Circuit Court and before the trial in that court, E. Y. Harding departed this life. In the Circuit Court a jury was waived. The suit was dismissed as to F. L. Harding and the Universal Fire Extinguisher Association, Limited. The trial proceeded against F. L. Smith, defendant in error. The Court found for the defendant in error and this writ of error was sued out by plaintiff in error.

It appears that E. L. Barton, plaintiff in error, maintained the business of installing Extinguishers in the buildings which belonged to the Hotel Stone Company. The claim is the insurance of buildings such as those for which plaintiff in error was receiver was considered on proof that the insurance would cause a reduction of insurance premium. Plaintiff in error spoke to Harding & Harding who did write an insurance policy about defendant insurance and further testified that the plaintiff in error was acquainted with the

Key Registry and Insurance Association, Limited, which indicated it carried such risks. Defendant in error showed the communication to the plaintiff in error and the matter was discussed between them. Defendant in error suggested that he would write to the association concerning the insurance sought by plaintiff in error. After some correspondence the risks were accepted and plaintiff in error paid the premium which Keating remitted. Later on defendant in error received pay from the company for his services.

It appears that the agency which had written defendant in error and through procured the insurance in the four different companies was located in New Albany, Indiana. The companies that wrote the insurance were all foreign companies and were organized in foreign countries. They were not authorized to do business in Illinois.

The buildings of the property of which plaintiff in error was receiver were damaged. Proofs of loss were submitted and the insurance companies refused to pay on the ground that they had not received the premiums.

This suit is prosecuted against defendant in error on the theory that he acted as an agent for the insurance companies which were not authorized to do business in this state and that he is therefore liable for the re-payment of the premiums to the plaintiff in error. The evidence fails to establish the fact that the defendant in error was an agent of the companies or that he held himself out to the plaintiff in error to be an agent. Plaintiff in error was thoroughly acquainted with the situation. He had been informed by the defendant in error that he represented no companies which could carry the risk. When he received a letter from the Indiana agency he was not acting for it or for any insurance company it represented. The record discloses that he gave the information to plaintiff in error only for what it was worth and the plaintiff in error acted upon it with full knowledge of the facts. Both the defendant in error and the plaintiff in error knew that standard companies would not accept the hazard and they must have known that the companies they were dealing with were of a speculative character. Whether or not the insurance companies received the premiums is of no

Ray Shipley and Tuscarora Insurance, Limited, which indicated it would not pay. Defendant's agent charged the commissioning be the liability in order that the plaintiff and defendant in error. Defendant in error contended that he would write to the association primary for the insurance company by plaintiff in error. After some correspondence the claim was adjusted and plaintiff in error paid the premium with hearing premium. Later on defendant in error received her from the company for his services.

It appears that the company which had written defendant in error had ceased to transact the business in the first different companies and Insured - the Affiny, Indiana. The evidence that made the insurance made also all insurance companies not agreeing to design companies. They also had indemnified to do business in Illinois.

The testimony of the witness of which plaintiff in error was [illegible] was denied. Proofs of loss were solicited and the insurance company refused to pay on the ground that they had not received the premium.

The suit is prosecuted because defendant in error in the theory that he acted as an agent for the insurance corporation which were not authorized to do business in this state and that he is therefore liable for the re-payment of the premium to the plaintiff in error. The evidence fails to establish the fact that the defendant in error was an agent of the companies or that he held himself out to the plaintiff in error to be an agent. Plaintiff in error was thoroughly acquainted with the circumstances. He had been informed by the defendant in error that he represented no companies which would carry the risk. Then he received a letter from the Indiana agency he was not acting for it or for any insurance company is represented. The sworn statements that he gave the information to plaintiff in error only for that he is now with and the plaintiff in error acted [illegible] upon the strength of the proofs. That the defendant in error and the plaintiff in error knew that disabled companies would not make a the bargain and they only have been that the companies they were dealing with were of a responsible character. Under

consequence here, as it is conceded that defendant in error made a remittance to the Insurance Association. Whether it in turn distributed the premiums among the companies entitled to them is not shown by the record. The mere fact that the defendant in error was afterwards paid a commission does not change the situation. It does not establish the fact that he was the agent of the said insurance companies.

We think the decision of the Circuit Court was right and the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 5 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Elsie Westerdahl,

Defendant in error

vs.

The Rockford Cab and Driveurself Inc., a corporation,

Plaintiff in error,

Error to Circuit Court of Winnebago County.

JONES, J:

An action on the case was instituted by Elsie Westerdahl, plaintiff, against the Rockford Cab and Driveurself Inc., to recover for injuries received in a collision between an automobile in which she was riding and a taxicab belonging to defendant. A jury trial resulted in a verdict and judgment for plaintiff.

The sole ground relied upon for a reversal of said judgment is the giving of two instructions on behalf of plaintiff, the first of which is as follows: " The Court instructs the jury that if you believe in this case that the plaintiff, Elsie Westerdahl, has proven her case by a preponderance or greater weight of the evidence, then in that event your verdict should be for the plaintiff, Elsie Westerdahl." This instruction should not have been given. Substantially the same instruction was criticised in Holley v. Chicago Rapid Transit Company, 335, Ill. 184, where it was said that, "Instructions similar to this one have been criticised by this court in many cases. The instruction first states that it is for the plaintiff to prove her case by the preponderance of the evidence, and refers to the evidence bearing on plaintiff's case without any statement as to what the case is or what it is necessary for her to prove, but it refers the whole case to the jury without any limitations. It opened the door for the jury to take any view of plaintiff's case which they saw fit to take and to arrive at a verdict for any reason which might seem to them to be sufficient, without any rule to guide them." But the giving of such an instruction has generally been held not ground for

reversing a judgment. (Krieger v. A. E. & C. R. R. Co., 242 Ill. 544.)

The second instruction given on behalf of the plaintiff is also erroneous, because it does not limit the right of recovery to the negligence charged in the declaration and permitted a recovery if the jury found the defendant was negligent, whether the particular negligence was averred in the declaration or not. This instruction has been very often condemned, and the giving of it will generally be held to be reversible error. (Herring v. C. & A. R. R. Co., 209 Ill. 214; Kelley v. Chicago Rapid Transit Co., supra.) But in the instant case, the defendant was equally in error. Its given instruction No. 1 told the jury that before the plaintiff could recover, she must prove by a preponderance of all the evidence that at or immediately before the collision in question, "the servant of the defendant was guilty of such negligence, if any, as to contribute or cause the collision in question," and that if she failed to make such proof, the jury must find the defendant not guilty. This instruction directs a verdict and fails to limit the right of recovery to the negligence averred in the declaration. The defendant has no right to complain of errors in the record which are attributable to it equally with the plaintiff. (Fleming v. N. J. & E. Ry. Co., 275 Ill. 486; Brennan v. C. & S. Coal Company, 241 Ill. 510; Harding v. St. Louis Stock Yards, 242 Ill. 444.)

The record in this case warrants an affirmance of the judgment.

Judgement Affirmed.

assessing a judgment. [Citations omitted.] 3 Ill. App. 3d 1, 10, 277 N.E. 2d 1, 7 (1st Dist. 1971).

The general indemnity clause in behalf of the guarantor by also attempting, however, to deny the right of recovery on the contingencies covered in the indemnity, and imposing a condition if the jury finds the defendant was negligent, whether the particular conditions were covered in the indemnity or not. This indemnity has been very often construed, and the giving of it will generally be held to be unreasonable waiver. [Citations omitted.] 3 Ill. App. 3d 1, 10, 277 N.E. 2d 1, 7 (1st Dist. 1971) (Leiter J. dissenting from trial court's finding of negligence). In the instant case, the defendants are entitled to a new trial. The trial court's instruction to the jury that the defendants were negligent, if the jury found the defendants were guilty, was a prejudicial error for which the judgment must be reversed. The defendants are entitled to a new trial on the issue of damages. The defendants are entitled to a judgment in the second count, as a matter of law, in accordance with the opinion. [Citations omitted.] 3 Ill. App. 3d 1, 10, 277 N.E. 2d 1, 7 (1st Dist. 1971) (Leiter J. dissenting from trial court's finding of negligence).

The amount in this case corroborate an affirmance of the judgment.

Judgment affirmed.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 8275 Agenda Number 10

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error vs. GRANVILLE MILLER, Plaintiff in Error	Error to County Court Lee County.

BOGGS, J.

On October 25th, 1929, the State's Attorney of Lee County filed in the county court an information in three counts, charging plaintiff in error with possession and sale of intoxicating liquor, in violation of the Illinois prohibition law. To said information plaintiff in error entered a plea of not guilty. A trial was had, resulting in a verdict of guilty, on which judgment was rendered. Plaintiff in error was fined $200 on the first and third counts, respectively, and was sentenced to the county jail for sixty days on the second count. To reverse said judgment, this writ of error is prosecuted.

The record in this case, except as to the evidence relied on in support of the verdict, is substantially the same as the record in People v. Bott, general no. 8274. In the Bott case, the evidence of sales of liquor was to the effect that they had been made by the wife of Bott, while here the evidence was of sales by plaintiff in error. The same errors are assigned on this record as in People v. Bott, and the same authorities are cited in support thereof.

For the reasons set forth in the opinion filed in People v. Bott, the judgment is reversed and the cause remanded.

Reversed and remanded.

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error

vs.

CHARLTON BOLLING,

Plaintiff in Error

Error to

Circuit Court

Lee County.

MODE, J.

On October 25th, 1969, the State's Attorney of Lee County filed in the county court an information in three counts, charging plaintiff in error with possession and sale of intoxicating liquor, in violation of the Illinois prohibition law. To said information plaintiff in error entered a plea of not guilty. A trial was had, resulting in a verdict of guilty, on which judgment was rendered. Plaintiff in error was fined $200 on the first and third counts, respectively, and was sentenced to the county jail for sixty days on the second count. To reverse said judgment, this writ of error is prosecuted.

The record in this case, except as to the evidence relied on in support of the verdict, is substantially the same as the record in People v. Bott, general no. 8274. In the Bott case, the evidence of sales of liquor was to the effect that they had been made by the wife of Bott, while here the evidence was of sales by plaintiff in error. The same errors are assigned on this record as in People v. Bott, and the same authorities are cited in support thereof.

For the reasons set forth in the opinion filed in People v. Bott, the judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 18 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 8287 Agenda Number 12

PEOPLE OF THE STATE OF ILLINOIS, Defendant in error vs. ROBERT JONES, Plaintiff in error.	Error to County Court Lee County.

BOGGS, J.

On November 2, 1929, the State's attorney of Lee County filed in the county court an information in three counts, charging plaintiff in error with possession and sale of intoxicating liquor, in violation of the Illinois prohibition law. To said information plaintiff in error entered a plea of not guilty. A trial was had, resulting in a verdict of guilty, on which judgment was rendered. Plaintiff in error was fined $200 on the first and third counts, respectively, and was sentenced to the county jail for sixty days on the second count. To reverse said judgment, this writ of error is prosecuted.

The record in this case is substantially the same as the record in People v. Bott, general no. 8274. The liquor alleged to have been sold was charged to have been sold by plaintiff in error through his wife, the same charge having been made in People v. Bott. The same assignments of error are made in this case as in People v. Bott, and the same authorities are cited in support thereof.

For the reasons set forth in the opinion filed in People v. Bott, the judgment is reversed and the cause remanded.

Reversed and remanded.

General Number 22117 | Special October 1?.

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in error,

vs.

ROBERT JONES,
Plaintiff in error.

| Error to Bureau
| Hon. Lee Bender.

Mr. J.

On November 8, 1922, the State's attorney of Lee County filed in the county court an information in three counts, charging plaintiff in error with possession and sale of intoxicating liquor, in violation of the Illinois prohibition law. To said information plaintiff in error entered a plea of not guilty. A trial was had, resulting in a verdict of guilty, on which judgment was rendered. Plaintiff in error was fined $200 on the first and third counts, respectively, and was sentenced to the county jail for sixty days on the second count. To reverse said judgment, this writ of error is prosecuted.

The record in this case is substantially the same as the record in People v. Bott, general no. 8274. The liquor alleged to have been sold was charged to have been sold by plaintiff in error through his wife, the same charge having been made in People v. Bott. The same assignments of error are made in this case as in People v. Bott, and the same authorities are cited in support thereof.

For the reasons set forth in the opinion filed in People v. Bott, the judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On APR 20 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 8301 Agenda Number 39

In the Appellate Court

of Illinois

Second District

October Term, A.D. 1930

Frank M. Ryan, Trustee under the Last Will and Testament of Terrence E. Ryan, deceased, Frank M. Ryan, individually, Lola O. Ryan, his wife, Harriette F. Ryan, Terrence E. Ryan, Jr., and Emily M. Ryan,

Appellants,

vs.

Mary A. Landon and John W. McQueen, Trustee,

Appellees,

Appeal from the Circuit Court of Kane County.

OPINION by BOGGS, J.

On August 9, 1927, appellees filed a bill in the Circuit Court of Kane County against appellants, one John W. Chaffee, Trustee, D. A. Green, successor in trust, and the St. Charles Charities, to foreclose a trust deed on certain described premises in said County given to secure a note for $22,700, signed by appellants and held by appellee Mary A. Landon. Said bill set forth that a portion of said premises were subject to a first mortgage or trust deed to John W. Chaffee, Trustee, securing a note in the sum of $20,000, held by the St. Charles Charities.

An answer was filed to said bill by appellants. Chaffee, Green and St. Charles Charities, also answered said bill, admitting that their rights and interests under said trust deed were correctly set forth in said bill, and praying to be dismissed, etc. Replications were filed to said answers by appellees. A cross bill was filed by appellants, praying certain relief against appellees, to which answers were filed.

The cause was referred to the master to take the evidence and to report the same, with his conclusions. The evidence taken and reported by the master discloses that prior to the filing of said bill there had been paid on said note the sum of

In the Appellate Court

of Illinois

Second District

October Term, A.D. 1930

Frank E. Ryan, Trustee under the
Last Will and Testament of Terrence
E. Ryan, deceased, Frank E. Ryan,
individually, Lelia O. Ryan, his wife,
Marjorie T. Ryan, Terrence E. Ryan, Jr.,
and Emily K. Ryan,

Appellees,

vs.

Mary A. Landon and John W. McGreen,
Trustee,

Appellees.

Appeal from the
Circuit Court
of Kane County.

OPINION by HODGES, J.

On August 8, 1927, appellees filed a bill in the Circuit Court of Kane County against appellants, one John W. Chaffee, Trustee, D. A. Green, successor in trust, and the St. Charles Charities, to foreclose a trust deed on certain described premises in said County given to secure a note for $22,700, signed by appellants and held by appellee Mary A. Landon. Said bill set forth that a portion of said premises were subject to a first mortgage or trust deed to John W. Chaffee, Trustee, securing a note in the sum of $20,000, held by the St. Charles Charities.

An answer was filed to said bill by appellants. Chaffee, Green and St. Charles Charities, also answered said bill, admitting that their rights and interests under said trust deed were correctly set forth in said bill, and praying to be dismissed, etc. Replications were filed to said answers by appellees. A cross bill was filed by appellants, wherein certain relief against appellees, to which answers were filed.

The cause was referred to the master to take the evidence and to report the same, with his conclusions. The evidence taken and recorded by the master disclosed that prior to the filing of said bill there had been paid on said note the sum of

$396.32. After the filing of said bill, there was paid by appellants the further aggregate sum of $13,849.75. The master found and reported that, with the accrued interest, there was due to appellee Mary Landon $12,312.03. A decree of foreclosure was entered in accordance with the findings of the master, and a solicitor's fee of $1,000 was allowed to complainants' solicitors. Thereafter, on motion of the solicitors for the holders of said first mortgage, the court ordered that a fee of $50.00 be allowed to said solicitors. To reverse said decree, this appeal is prosecuted.

It is first contended by counsel for appellants that the court erred in allowing said solicitors' fee of $1,000. The trust deed in question provided in effect that, upon the filing of a bill to foreclose said trust deed, there should be allowed to the holder of said note a reasonable attorneys' fee, and further provided that if, after the filing of such bill, the indebtedness was paid, then "one-half of the attorneys' fee above stipulated" should be allowed.

The bill sets forth said provision of the trust deed, and prayed for the allowance of solicitors' fees. On the hearing before the master, one Emil Benson was called as a witness by appellees and testified in effect that he was a practicing attorney; that he was familiar with the usual fees in foreclosure matters, and that a reasonable fee in this character of case would be from $1,000 to $1,500. This was the only evidence offered on the hearing on said motion.

It is contended by counsel for appellants that, in view of the substantial payments made on said indebtedness, and in view of the provision of said trust deed for the reduction of the attorneys' fees where payment had been made after the filing of a bill to foreclose, said fee is excessive, and that the court of its own motion should reduce the amount thereof.

The provisions in said trust deed warranted the court in granting appellee's motion for the allowance of a solicitors' fee. Cohen v. Northwestern Life Ins. Co., 185 Ill. 340; Haldeman v. Mutual Life Ins. Co., 120 Ill. 390-393; Heffern v. Gage, 149 Ill. 182-191. Appellees having offered competent evidence

[illegible] the filing of such bill, instructions made by appellants the further expenses will of $15,844.74. The master found and reported that, with the accrued interest, there was due to appellee Mary Denham $19,719.08. A decree of foreclosure was entered in accordance with the findings of the master, and a solicitor's fee of $1,000 was allowed to complainants' solicitors. Thereafter, on motion of the solicitors for the holders of said first mortgage, the court ordered that a fee of $50.00 be allowed to said solicitors. To reverse said decree, this appeal is prosecuted.

It is first contended by counsel for appellants that the court erred in allowing said solicitors' fee of $1,000. The trust indenture provided in effect that, upon the filing of a bill to foreclose said trust deed, there should be allowed to the holder of said note a reasonable attorneys' fee, but further provided that if, after the filing of such bill, the indebtedness was paid, then "one-half of the attorneys' fee above stipulated" should be allowed.

The bill sets forth said provisions of the trust deed, and prayed for the allowance of solicitors' fees. On the hearing before the master, one Emil Denham was called as a witness by appellees and testified in effect that he was a practicing attorney; that he was familiar with the usual fees in foreclosure matters, and that a reasonable fee in this character of case would be from $1,000 to $1,500. This was the only evidence offered on the hearing on said motion.

It is contended by counsel for appellants that, in view of the substantial payments made on said indebtedness, and in view of the provision of said trust deed for the reduction of the attorneys' fees where payment had been made after the filing of a bill to foreclose, said fee is excessive, and that the court of its own motion should reduce the amount thereof.

The provisions in said trust deed warranted the court in granting appellee's motion for the allowance of a solicitors' fee. Cohen v. Northwestern Life Ins. Co., 185 Ill. 540; Haldeman v. Mutual Life Ins. Co., 190 Ill. 390-392; Heffern v. Gage, 140 Ill. 188-191. Appellees having offered competent evidence

as to what would constitute a reasonable fee, and there being no evidence to the contrary, the court would not be warranted in disregarding the same, unless such fee were so excessive that the court would be compelled to hold the same unreasonable. Nathan v. Brand, 167 Ill. 307-309; Cohen v. Northwestern Life Ins. Co., supra, 3411 Burns v. Turnes, 207 App. 181-185. On the record in this case, there was nothing to warrant the court in holding said fee unreasonable. The court therefore did not err in allowing the same.

It is next insisted that the court erred in allowing to the solicitors representing the trustee and the holder of the indebtedness secured by said first trust deed, the sum of $50.00 as solicitors' fees. It is insisted that, inasmuch as the rights and interests of the holders of said indebtedness were correctly set forth in the original bill, the court should have dismissed said parties, and that there would then have been no occasion for the allowance of a solicitors fee.

Appellants are not in a position to successfully urge this assignment of error for the following reasons:

(1) They have not made said trustee nor the holder of said note parties to this appeal.

(2) They have not, by their abstract, set forth the provisions of said trust deed with reference to the allowance of solicitors' fees, so this court might determine the propriety of said order.

(3) Said order is not a part of the decree which is sought to be reversed in this proceeding.

For the reasons above set forth, the decree of the trial court will be affirmed.

Decree affirmed.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the ~~Third~~ Fifth day of ~~February~~ May, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. ~~FRANKLIN H. BOGGS~~ FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8314 Agenda No. 15

In the Appellate Court of Illinois

Second District

February Term, A. D. 1931

Lenora L. Hughes, Administratrix of
the Estate of Georgie Lee Hughes,
deceased,
appellant

vs.

Edward Prather,
appellee,

Appeal from the Circuit Court
of Peoria County.

OPINION PER CURIAM:

Appellant, administratrix of the estate of Georgie Lee Hughes, deceased, instituted an action on the case against appellee in the circuit court of Peoria County to recover the pecuniary damages alleged to have been suffered by the next of kin of said deceased, growing out of an automobile accident, charged to have been the result of negligence on the part of an agent of appellee.

On November 15, 1929, appellee, on limited appearance, filed a plea to the jurisdiction of his person. On January 18, 1930, by agreement of parties, leave was given appellee to amend said plea. On January 29, 1930, leave was given appellee to withdraw said plea and to file an amended plea instanter. On motion of appellant, the demurrer then on file was extended to the amended plea filed on that day. Said demurrer was overruled, and leave was given appellant to reply within ten days.

On February 4, 1930, an alias summons was issued, directed to the sheriff of said county, and on February 28, 1930, was returned "not found". Upon praecipe filed by appellant, a third summons was issued on March 17, 1930, returnable at the May term, 1930, which was personally served on appellee on said day.

On May 10 a plea to the jurisdiction was filed by appellee attacking the validity of the service under the summons of March 17. On September 12 leave was given appellee to withdraw his plea filed on May 10, and to file a motion to quash the summons issued March 17 and the return thereon. Said motion was supported by affidavit,

Gen. No. 8224 Agenda No. 13

In the Appellate Court of Illinois

Second District

February Term, A. D. 1931

Laura L. Hughes, Administratrix of
the Estate of George Lee Hughes,
Deceased,

appellant

vs.

Edward Trainer,

appellee,

Appeal from the Circuit Court
of Peoria County.

OPINION FILED OCTOBER 1, 1931:

Appellant, administratrix of the estate of George Lee Hughes, deceased, instituted an action on the case against appellee in the circuit court of Peoria County to recover the pecuniary damages alleged to have been suffered by the next of kin of said deceased, growing out of an automobile accident, charged to have been the result of negligence on the part of an agent of appellee.

On November 15, 1929, appellee, on limited appearance, filed a plea to the jurisdiction of his person. On January 18, 1930, by agreement of parties, leave was given appellee to amend said plea. On January 29, 1930, leave was given appellee to withdraw said plea and to file an amended plea instanter. On motion of appellant, the demurrer then on file was extended to the amended plea filed on that day. Said demurrer was overruled, and leave was given appellant to reply within ten days.

On February 4, 1930, an alias summons was issued, directed to the sheriff of said county, and on February 22, 1930, was returned "not found". Upon praecipe filed by appellant, a third summons was issued on March 17, 1930, returnable at the May term, 1930, which was personally served on appellee on said day.

On May 10 a plea to the jurisdiction was filed by appellee attacking the validity of the service under the summons of March 17. On September 12 leave was given appellee to withdraw his plea filed on May 10, and to file a motion to quash the summons issued March 17 and the return thereon. Said motion was supported by affidavit,

setting forth the matters and things shown by the record. Said motion was allowed, and said writ and the return thereon was quashed. Thereupon appellant withdrew her leave to reply to the plea filed January 30, 1930, and elected to abide her demurrer to said plea. The court adjudged "that the said plaintiff, Lenora L. Hughes, administratrix of the estate of Georgie Lee Hughes, deceased, take nothing by her suit, and that the defendant, Edward Prather, go hence without day, and have judgment of costs against said plaintiff." To reverse said judgment, this appeal is prosecuted.

The grounds relied on by appellant for a reversal of said judgment, are set forth in her brief as follows:

"(1) That the court erred in overruling the plaintiff's demurrer to the second amended plea to the jurisdiction.

"(2) That the court erred in sustaining the defendant's motion to quash the alias pluries summons issued March 17, 1930, and the return thereon, and in quashing the same.

"(3) That the court erred in entering judgment in bar and for costs against the plaintiff."

The plea in question is as follows:

"Edward Prather, in his own proper person, comes and appears specially for the purpose of this amended plea only, and says that before and at the time of the commencement of said action of the said Lenora L. Hughes, Administratrix, he, the said Edward Prather, was, and from thence hitherto has been and still is, residing in the County of Marshall, in the State of Illinois, and not in the said County of Peoria; that the alleged service of process in the above entitled cause was had upon him, the said Edward Prather, while he was in attendance upon the trial of a law case entitled Lenora L. Hughes, Administratrix of the Estate of Georgie Lee Hughes, deceased, versus the White Truck Line Company, which said cause was then being heard in the Circuit Court of Peoria County; that he, the said Edward Prather, was at the time of the commencement of said suit and from thence hitherto and still is the President of the White Truck Company which was sued in said cause under the name of the White Truck Line Company; that he appeared in said court aforesaid as president and acting for and in behalf of said company of which

taking form the motions and views given by the counsel. This motion was filed, and said writ and the return thereon was quashed. Thereupon appellant sued out a writ of error to the plea filed January 20, 1902, and elected to abide his demurrer to said plea.

The court adjudged "that the said plaintiff, Lenora I. Hughes, administratrix of the estate of Joseph Lee Hughes, deceased, take nothing by her suit, and that the defendant, Edward Prather, go hence without day, and have judgment of costs against said plaintiff."

To reverse said judgment, this appeal is prosecuted.

The grounds relied on by appellant for a reversal of said judgment, are set forth in her brief as follows:

"(1) That the court erred in overruling the plaintiff's demurrer to the second amended plea to the jurisdiction.

"(2) That the court erred in sustaining the defendant's motion to quash the alias pluries summons issued herein, and the return thereon, and in quashing the same.

"(3) That the court erred in entering judgment in bar and for costs against the plaintiff."

The plea in question is as follows:

"Edward Prather, in his own proper person, comes and appears specially for the purpose of this amended plea and, and says that before and at the time of the commencement of said action of the said Lenora I. Hughes, Administratrix, he, the said Edward Prather, was, and from thence hitherto has been and still is, residing in the County of Warrenall, in the State of Illinois, and not in the said County of Peoria; that the alleged service of process in the above entitled cause was had upon him, the said Edward Prather, while he was in attendance upon the trial of a law case entitled Lenora I. Hughes, Administratrix of the Estate of George Lee Hughes, deceased, versus the White Truck Line Company, which said cause was then being heard in the Circuit Court of Peoria County; that he, the said Edward Prather, was at the time of the commencement of said suit and from thence hitherto and still is the President of the White Truck Company which was sued in said cause under the name of the White Truck Line Company; that he appeared in said court aforesaid as President and acting for and in behalf of said company of a lot

he is practically the sole owner; that at the time of the trial aforesaid and previous thereto he was the executive of the company; and for the further reason of showing the fact that the White Truck Company was sued in said cause under the name of the White Truck Line Company; that he was a witness and did testify in said cause to that effect, and that said cause resulted in the plaintiff's amending the name of the defendant in said cause from the White Truck Line Company to The White Truck Company; that while he was so in attendance upon said trial in the court room in Peoria County, and during the progress of said trial and while the Honorable A. Clay Williams, judge of said court was upon the bench hearing said law cause, a deputy sheriff of Peoria County served the summons in the above entitled cause upon him, the said Edward Prather, and that no other writ or summons in this cause has ever been served upon him that the said action is not a local action, and that he, the said Edward Prather, was in said County of Peoria at said time for no other purpose than to attend upon the trial of said cause and had no occasion or reason to be in said County of Peoria other than as a material witness in said cause as above stated; and this the said Edward Prather is ready to verify; wherefore, he prays judgment if the court will here take cognizance of the action aforesaid."

In support of the first ground relied on by appellant, it is insisted that the cause on hearing at the time appellee was first served was against the White Truck Line Company; that appellee was not an officer of said company nor a party in interest and did not claim to know "any of the material facts which might become evidence in such trial"; that a judgment against said corporation would not have injured appellee; that after the White Truck Company was made the defendant to said suit; appellee, as the president thereof, was not a party in interest, and was not subpoenaed as a witness; that his coming into said county was purely voluntary and he was therefore legally served and the court erred in overruling the demurrer to said plea.

A non-resident suitor is privileged from service of legal process in civil actions while attending upon the trial of

ed in the plaintiff's amending the name of the defendant in said cause from the White Truck Company to The White Truck Line Company; that while he was so in attendance upon said trial in the court room in Peoria County, and during the progress of said trial and while the Honorable A. Gay Williams, judge of said court was upon the bench hearing said law cause, a deputy sheriff of Peoria County served the summons in the above entitled cause upon him, the said Edward Prather, and that no other writ or summons in this cause has ever been served upon him that the said action is not a local action, and that he, the said Edward Prather, was in said County of Peoria at said time for no other purpose than to attend upon the trial of said cause and had no occasion or reason to be in said County of Peoria other than as a material witness in said cause as above stated; and this the said Edward Prather is ready to verify; wherefore, he prays judgment if the court will here take cognizance of the action aforesaid."

In support of the first ground relied on by appellant, it is insisted that the cause on hearing at the time appellee was first served was against the White Truck Line Company; that appellee was not an officer of said company nor a party in interest and did not claim to know "any of the material facts which might become evidence in such trial"; that a judgment against said corporation would not have injured appellee; that after the White Truck Company was made the defendant to said suit; appellee, as the president thereof, was not a party in interest, and was not subpoenaed as a witness; that his coming into said county was purely voluntary and he was therefore legally served and the court erred in overruling the demurrer to said plea.

A non-resident suitor is privileged from service of legal process in civil actions while attending upon the trial of

a cause in a county other than that of his residence. Gregg v. Summers, 29 App. 110; Beatty v. Monohan, 240 App. 240-242.

While counsel for appellant practically concedes the correctness of the foregoing rule, it is insisted that, in order for said rule to apply, the party served must be in fact a named party to the suit.

The plea sets forth that appellee was not only the president of said White Truck Company, but that he was the sole owner of practically all of its stock and that he was the executive of the company. While no case has been cited, and we have found none exactly in point, we hold that where, as here, the party served is in effect the sole owner of the stock of the corporation sued, and the manager or executive thereof, he should be immune from service of civil process while in attendance on such trial, and for a reasonable time in coming and going.

While pleas in abatement, strictly speaking, are not amendable, pleas in abatement in the nature of pleas to the jurisdiction of the court of the person are amendable. Spencer v. Aetna Indemnity Co., 231 Ill. 82-85. A plea of this character is held to be not strictly a plea in abatement, but a meritorious plea, necessary to the protection of a substantial right granted by statute, and in such case the plea is amendable. Safford v. Sangamo Ins. Co., 88 Ill. 296; Drake v. Drake, 83 Ill. 526; Humphrey v. Phillips, 57 Ill. 132; Midland P. Ry. Co. v. McDermott 91 Ill. 170. Under the foregoing authorities, we hold that the court did not err in overruling the demurrer to said plea.

It is next insisted that the court erred in sustaining the defendant's motion to quash "the alias pluries summons issued March 17, 1930, and the return thereon."

Section 4 of the Practice act provides:

"Whenever it shall appear by the return of the sheriff or coroner that the defendant is not found, the clerk shall, at the request of the plaintiff, issue another summons or capias, as the case may be, and so on until service is had."

The summons issued March 17 was issued on the praecipe of appellant. Counsel for appellant does not seriously rely

on the return "not found" on the second summons, but insist that, inasmuch as the court overruled the demurrer to appellee's plea to the jurisdiction, such holding in effect amounted to a "not found" on the first summons, and that, under the provision of said section 4, appellant therefore had the right to have additional summonses issued until service could be had. No authority was cited by appellant sustaining this position.

In Daley v. City of Chicago, 295 Ill. 276, a summons had been issued and delivered to the plaintiff's attorney. It was held by him for four years, when it was surrendered to the clerk and a new summons was issued. At page 278 the court says:

"By section 1 of the Practice act the first process was a summons directed to the sheriff and made returnable the first day of the next term. By the second section it is made the duty of the sheriff, when practicable, to serve the writ ten days before the first day of the return term and return the writ to the clerk with the indorsement of service. Section 4 provides: 'Whenever it shall appear, by the return of the sheriff or coroner, that the defendant is not found, the clerk shall, at the request of the plaintiff, issue another summons or capias, as the case may be, and so on until service is had.' It is very clear the clerk would have had no authority on the mere request of the plaintiff to issue the alias writ, and this was apparently recognized by plaintiff in procuring the indorsement of the court on the original summons directing that an alias writ issue."

Under the foregoing authority, we hold the summons of March 17 and the return thereon was properly quashed as the clerk had no authority to issue the same. We further hold that the overruling of the demurrer to appellee's plea did not amount to a "not found" as contemplated by said statute. Appellee was found in the county, but under our holding, as he was served while attending on the trial of a case, he was immune from service.

It is next insisted that the court erred in entering a judgment in bar of action and for costs.

The judgment entered was not in bar, and is not so contended for by counsel for appellee. The judgment, however, should

on the return "not found" on the merits somewhat, but itself (not impaired by the merits) permitted the discovery to supplement's plea in the garnishment, thus subjecting to attach. Language to a "not found" on the first summons, and that, under the provisions of sect. 4, specifies transfers not the right to have additional summonses issued until service could be had. In authority was cited by appellant sustaining this contention.

In Ohler v. City of Chicago, 203 Ill. 374, a summons had been issued and delivered to the plaintiff's attorney. It was said in 5th for four years, when it was surrendered to the clerk and a new summons was issued. At page 376 the court says:

"By section 1 of the Practice act the first process was a summons directed to the sheriff and made returnable the first day of the next term. By the second section it is made the duty of the sheriff, when possible, to serve the writ ten days before the first day of the return term and return the writ to the clerk with the indorsement of service. Section 4 provides: 'Whenever it shall appear, by the return of the sheriff or officer, that the defendant is not found, the clerk shall, at the request of the plaintiff, issue another summons or capias, as the case may be, and so on until service is had.' It is very clear the clerk would have had no authority on the mere request of the plaintiff to issue the alias writ, and this was apparently recognized by plaintiff in procuring the indorsement of the court on the original summons directing that an alias writ issue."

Under the foregoing authority, we hold the summons of March 17 and the return thereon was properly quashed as the clerk had no authority to issue the same. We further hold that the garnishing of the tenants to appellee's alleged summons to a "not found" as constituted by said statute. Appellee was there in the county, but under our holdings, as he was served while attending on the trial of a case, he was immune from service.

It is next insisted that the court erred in entering a judgment in bar of action and for costs.

The judgment entered was not in bar, and is not so construed for by counsel for appellee. The judgment, however, should

have been that the writ be quashed. Motherell v. Beaver, 2 Gilm 69-71; Eddy v. Brady, 16 Ill. 306-308; Cushman v. Savage, 220 Ill 330; Spaulding v. Lowe, 58 Ill. 96-97; Schomide v. Brewerton, 396 Ill. 365; Hill v. Trapp, 206 App. 272-274.

In Cushman v. Savage, supra, the court at page 330 says:

"In this case there was ap a plea in abatement of the jurisdiction of the court, the plaintiff residing in La Salle County and the defendant in the County of Cass. To the plea the plaintiff demurred. It was overruled and the court granted plaintiff leave to reply. This was erroneous. After a demurrer to a plea in abatement has been overruled, it is not regular for a court to grant leave to peply; for a judgment for a defendant on such a plea, whether it be on an issue of fact or of law, is that the writ be quashed."

In Spaulding v. Lowe, supra, an action in assumpsit was brought by Cynthia A. Spaulding and another in the circuit court of Sangamon county against Francis Lowe and Alonzo Glenn. A summons was directed to Mason county, where service was had. The defendants appeared and filed a plea in abatement to the jurisdiction of the court. A general demurrer to said plea was overruled, and plaintiff, by leave of court, filed a replication. The court at page 97 says:

"It was error in the circuit court to give leave to reply after overruling a demurrer to a plea in abatement. This court has several times held this error to be cause of reversal. McKinstry v. Pemmoyer, 1 Scam. 319; Motherell v. Beaver, 2 Gilm 270. See also Eddy v. Brady, 16 Ill. 306. The error was not waived by anything subsequently done by defendants. The judgment must be reversed, the verdict set aside and judgment quashing the writ entered nunc pro tunc upon the demurrer."

In Schomide v. Brewerton, supra, the court at page 366 says:

"Frank Schomide began an action on the case for personal injuries against W. A. Brewerton and three others in the circuit court of Sangamon county and were served with process therein. Brewerton was a non-resident of Sangamon county and was served with process in Cook county. Defendants appeared and filed the general issue. On the trial, at the close of the plaintiff's case,

have been that the writ be issued. Sherwood v. Moore, 1 Ill. 62-64; Ashby v. Ashby, 13 Ill. 502-503; Bowman v. Bailey, 14 Ill. 339; Upshaw v. Lane, 24 Ill. 24-27; Bullock v. Dominguez, 38 Ill. 492; Hill v. Thorp, 109 Ill. 179-181.

In Dunham v. Barger, supra, the court at page 222 says:

"In this case there was no a plea in abatement of the jurisdiction of the court, the plaintiff residing in La Salle County and the defendant in the County of Cass. To the plea the plaintiff demurred. It was overruled and the court dismissed plaintiff's bill in equity. This was erroneous. After a demurrer to a plea in abatement has been overruled, it is not proper for a court to grant leave to reply; for a judgment for a defendant on such a plea, whether it be on an issue of fact or of law, is that the writ be quashed."

In Hamilton v. Lyon, supra, an action in assumpsit was brought by Dwight A. Hamilton and another in the circuit court of Sangamon county against Francis Lyon and Alexander Lyon. A summons was directed to Mason county, where service was had. The defendant's counsel filed a plea in abatement to the jurisdiction of the court. A general demurrer to said plea was overruled, and plaintiff, by leave of court, filed a replication. The court at page 97 says:

"It was error in the circuit court to give leave to reply after overruling a demurrer to a plea in abatement. This court has several times held this error to be cause of reversal. McIlwaiv v. Pennoyer, 1 Gilm. 633; Bradwell v. Weeks, 17 Ill. 290. See also Ashby v. Ashby, 13 Ill. 502. The error was not waived by anything subsequently done by defendants. The judgment must be reversed, the verdict set aside and judgment quashing the writ entered nunc pro tunc upon the demurrer."

In Schomaie v. Brewerton, supra, the court at page 588 says:

"Frank Schomaie began an action on the case for personal injuries against W. A. Brewerton and three others in the circuit court of Kankakee county and sued out with process thereon. Brewerton was a non-resident of Kankakee county and was served with process in Cook county. Defendants appeared and filed the general issue. On the trial, at the close of the plaintiff's case,

each of the defendants except Brewerton made a motion that the court instruct the jury to find him not guilty and the motions were allowed. Thereupon Brewerton, the remaining defendant, entered a motion that the service had upon him be quashed and the action dismissed, since he was a resident of Cook county. This motion was denied, and evidence was introduced on behalf of the defendant. A verdict was rendered, finding him guilty and assessing the plaintiff's damages at $750.00."

One of the points raised against Brewerton was that the motion to quash was not made in apt time. The court at page 369 says:

"Plaintiff in error could not make a motion to quash the summons or service at an earlier time. It would doubtless have been more in conformity with technical rules of practice to obtain leave to withdraw the plea of the general issue and to plead to the jurisdiction, but in this case there was no disagreement about the facts. They are conceded in the brief of the defendant in error. The court was advised of them as fully as if they had been set out in a plea, and should have acted in conformity with the real rights of the parties, by quashing the service of summons. The plaintiff in error had no right to have the suit dismissed. He may be served with an alias summons, should he be found in the county. The judgment will be reversed and the cause remanded to the circuit court, with directions to quash the service of summons."

Under the foregoing authorities, the judgment of the court, on appellant electing to abide her demurrer to appellee's plea to the jurisdiction, should have been that the writ be quashed.

Lastly it is insisted that, by obtaining leave to amend his plea to the jurisdiction, appellee submitted himself to the jurisdiction of the court. In Pooler v. Southwick, 126 App. 264, this court at page 267 in discussing a matter of this character said:

"A plea to the jurisdiction of the court is amendable and our liberal statute of amendments applies fully thereto. Midland Pacific Ry. Co. v. McDermid, 91 Ill. 170; Drake v. Drake, supra.

such of the jurisdiction against foreigners which a writ of error court instead the jury to find the act guilty and the serious acts allowed. Therefore however, was punishing defendant, entered a motion that the writ be quashed and the action dismissed, since he was a resident of such county. This motion was denied, and evidence was introduced on behalf of the defendant. A verdict was returned, finding the plaintiff and assessing the plaintiff's damages at $750.00."

One of the points raised against Brewster was that the motion to quash was not made in apt time. The court at page 385 says:

"Plaintiff in error could not make a motion to quash the summons or service of an original writ. It would evidently have been more in conformity with technical rules of practice to obtain leave to withdraw the plea of the general issue and to plead to the jurisdiction, but in this case there was no disagreement about the facts. They are recited in the brief of the defendant in error. The court was advised of them as fully as if they had been set out in a plea, and should have acted in conformity with the real rights of the parties, by quashing the service of summons. The plaintiff in error had no right to have the suit dismissed. He may be served with an alias summons, should he be found in the county. The judgment will be reversed and the cause remanded to the circuit court, with directions to quash the service of summons."

Under the foregoing authorities, the judgment of the court, on appellant electing to abide her demurrer to appellee's plea to the jurisdiction, should have been that the writ be quashed.

Lastly it is insisted that, by obtaining leave to amend his plea to the jurisdiction, appellee submitted himself to the jurisdiction of the court. In Foster v. Southwick, 128 Kan. 254, this court on page 257 in discussing a matter of this character said:

"A plea to the jurisdiction of the court is amendable and can without elaborate [illegible] Pacific Ry. Co. v. McDonald, 81 Ill. 170; Drake v. Drake, supra.

Hence a motion for leave to amend such a plea cannot be said to be a general appearance giving the court full jurisdiction. Such a rule would defeat the right to amend, for leave to amend can only be obtained by a motion to the court. It would be a contradiction in principle to hold that one may amend a plea to the jurisdiction of the court, but that if he asks leave to do so he thereby defeats the plea and gives the court full jurisdiction."

An examination of the record discloses that appellee at all times was limiting his appearance on the motions he was making, and did not thereby enter his appearance generally.

Counsel for appellee insisted in his argument that the judgment of the trial court had the effect of abating the present suit brought against him in Peoria county, but not that it was a judgment in bar, his contention being that he was entitled to be sued in his own county. Under the holding in Schomide v. Brewerton, supra, the judgment of the court should have been that the writ be quashed, but appellee was not entitled to have the suit dismissed.

The judgment is therefore reversed and the cause remanded to the circuit court, with directions to quash the service of summons.

Reversed and remanded with directions.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

Abstract
Opinion filed April 14, 1931.

41 A

261 I.A. 654

General No. 8500 Agenda No. 12

January Term, A. D. 1931

LILLIE B. TURNEY, Executrix of the Will of Sarah J. Tolson, Deceased, Defendant in Error,

vs.

RICHARD TOLSON, Plaintiff in Error.

Error to The Circuit Court, Shelby County.

ELDREDGE, J.

Lillie B. Turney, executrix of the will of Sarah J. Tolson, deceased, defendant in error, procured a judgment by confession in vacation in the Circuit Court of Shelby County for the sum of $1,090.11 against Richard Tolson, plaintiff in error, on a judgment note dated February 23, 1921 for the principal sum of $700.00 and bearing interest at 7 percent from date, payable to the order of Sarah J. Tolson and executed by plaintiff in error.

Plaintiff in error filed a motion to open up said judgment and for leave to plead and also filed an amended motion. In support of the amended motion an amended affidavit was executed by plaintiff in error. The amended motion makes the affidavit filed in support thereof a part of said motion. The amended motion was overruled. The enumerated points in the amended motion are as follows:—

(1) That the declaration filed is a declaration in favor of

Lillie B. Turney individually while the note filed is payable to the order of Sarah J. Tolson and is unassigned.

(2) The defendant owes nothing to the plaintiff in her individual right; that the note is payable to Sarah J. Tolson and not to plaintiff.

(3) That the affidavit of signature was executed before J. E. Dazey, notary, who was also the attorney for the plaintiff.

(4) Defendant has full and complete defense of set-off to the note attached to the declaration.

(5) That said judgment because of defects in the declaration, cognovit and affidavit, and the variance between the declaration and note, is void.

In the affaidavit which is made a part of the amended motion it is averred that Sarah J. Tolson was the mother of plaintiff in error who died testate July 18, 1927, and letters testamentary were issued to Lillie B. Turney under her will; that Lillie B. Turney is a daughter of Sarah J. Tolson, deceased; that Sarah J. Tolson in her life time was indebted to plaintiff in error for money loaned and advanced to her since the execution of the note which as a total exceed the principal and interest on the note owing to said Sarah J. Tolson at her death; that at the time of her death plaintiff in error had a set-off against said note more than sufficient to pay

it entirely; that he was at the time of her death indebted to her in no sum whatever; that said payments were made during the years 1921 to 1926, both inclusive, and a small part in 1927; that at this timo plaintiff in error cannot give the items of said payments in detail for the reason that certain of his papers have been misplaced but that certain of said items are,—insurance paid to M. S. Ayars, $60.00; two hogs, $84.78; money paid for deceased in connection with her conservatorship litigation, $125.00; fee of Dr. Sparling, $35.00; coal furnished, $4.50; cash paid out for deceased, $90.00; and other like items which will total in excess of the note at bar and its interest; that the taking of the judgment was a surprise to plaintiff in error; that the attorney for plaintiff had written affiant demanding payment of the note; that thereafter plaintiff in error talked over the phone with Lillie B. Turney, the executrix, and understood from her that she had not instructed judgment to be taken and would not let judgment be taken; that plaintiff in error is advised the note at bar is not the property of Lillie B. Turney, individually; that the attorney who acted as notary in the affidavit of signature is the same person who is the attorney signing the declaration; that the term during which in vacation this judgment was taken has not yet adjourned, etc.

It is elementary that in order to justify a Court in opening

up a judgment by confession it must clearly be shown that the judgment debtor has a defense which if proven would show that he does not owe the debt. It is also elementary that a Court will never open up a judgment to permit a defense of set-off. The pleadings and the affidavits show beyond dispute that plaintiff in error executed the note in question payable to the order of Sarah J. Tolson who is now deceased and that Lillie B. Turney is executrix of her will. As such executrix she became entitled to the possession of the note and had power to enter up judgment. The vital question for consideration on motions of this kind is whether the defendant owes the debt. At most the affidavit filed by plaintiff in error sets up only a partial defense to the debt. If he has any valid claim against the estate of Sarah J. Tolson, deceased, he has his remedy by filing and proving the same therein.

The judgment of the Circuit Court is affirmed.

Abstract
Opinion filed - April 14, 1931.

42A

261 I.A. 654

General No. 8451 Agenda No. 14

October Term, A. D. 1930

A. E. Hudson, doing business as A. E. Hudson Company (not incorporated), Appellant

vs.

Road District Number 6 of Morgan County, Illinois, Appellee

Appeal from Morgan

NIEHAUS, J.

This is an appeal from a judgment rendered by the circuit court of Morgan county in the case of A. E. Hudson doing business as a A. E. Hudson Company, plaintiff and appellant, against Road District Number 6 of Morgan County, the defendant and the appellee, in bar of the plaintiff's suit and against his right to recover.

The record discloses that the plaintiff bases his right of recovery on the averments of a declaration containing the common counts, and an affidavit of claim. The record further shows, that the plaintiff was ruled to file a more specific bill of particulars; and thereupon that motion made by the defendant for a rule to file a more particular bill of particulars was denied by the court. And that thereafter the defendant filed a plea of the general issue and an affidavit of merits; and that the defendant's affidavit of merits filed with the plea, was stricken; and that thereupon the Court gave the defendant leave to file an amended affidavit of merits; and the court after that also gave the appellant leave

to amend his bill of particulars. Finally the record discloses, that the cause was heard by the court upon the declaration, the amended bill of particulars and the plea of the appellee, and the amended affidavit of merits filed by the defendant in support thereof; and that the motion of the appellant to strike the plea of the appellee for want of sufficient affidavit of merits in support of its plea was denied by the court; and that the plaintiff elected to stand by his motion to strike the plea and amended affidavit of merits; and thereupon the court ordered and adjudged that the appellant herein take nothing by his suit against the appellee, and that the appellant pay the costs of the suit, which was in legal effect a judgment in bar to a recovery by the appellant.

Error is assigned on this judgment rendered in bar of plaintiff's suit and for costs against him. Various questions are raised concerning the pleadings and the merits of plaintiff's cause of action, which in the condition of the record are not necessary to consider or pass upon. It is sufficient to point out, the merits of the controversy were not properly before the court for consideration nor final judgment. The denial of motion of plaintiff to strike the plea and the affidavit of merits left certain issues which were raised by the pleadings, and were questions of fact to be disposed of by a jury, upon a trial of the case. It was not within the province of the court to pass upon these issues of fact;

nor to render a final judgment upon the issues of fact involved.

We conclude therefore, that the judgment rendered is erroneous; and it is therefore reversed and the cause remanded for further proceedings.

Reversed and remanded.

Abstract.
Opinion filed - April 14, 1931

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261 I.A. 654

General No. 8464 Agenda No. 23

October Term, A. D. 1930

NOAH ROTH, Appellee,

vs.

CARRIE GRESHAM, Appellant.

Appeal from Calhoun.

NIEHAUS, J.

In this case an appeal is prosecuted by the appellant Carrie Gresham from a decree of the Circuit court of Calhoun county foreclosing the lien of a mortgage on an 80 acre farm owned by her. The mortgage referred to, was made on March 18, 1927, to secure a promissory note for $1300.00 to Grant Gresham, the husband of appellant, in conformity with and as the result of a settlement of property rights between husband and wife after a separation had taken place between them.

Appellant makes the following statement in the brief concerning this settlement: 'By agreement the appellant and her husband were each to assume one half of a $1500 debt to the Bank of Hamburg, and appellant was to allow her husband $550.00 for his dower interest in the 80 acre farm and was to allow him the sum of $750.00 for the personal property, goods and chattels, that were then situated and used in operating the farm. The aggregate of said sums ($1300.00) to be evidenced by a note of that amount, and secured by a mortgage on the farm; appellant's husband, said Grant Gresham, to execute and deliver to appellant his deed

to his dower in the farm and a bill of sale for the aforesaid personal property.'

The appellant also states that, "Appellant immediately took possession of the personal property and has never been disturbed in that possession but the deed to dower interest of her husband, Grant Gresham, mortgagee in the mortgage sought to be foreclosed, has never been conveyed."

Appellant's defense in the foreclosure proceedings is on the ground, that the mortgagee Grant Gresham did not entirely fulfill his part of the settlement between them by his failure to convey his dower interest to the appellant; also, because of a right of set off; that the mortgagee before the assignment of the mortgage to Noah Roth the appellee, was indebted to her in a total sum, which it is claimed, is greater than the amount of the mortgage; and that the appellee as assignee of the mortgage took the mortgage subject to her right of set off.

The decree rendered by the court allowed the appellant a set off amounting to the sum of $200.00. To maintain her right of set off, the appellant testified and introduced evidence, much of which is purely hearsay. Concerning the competent evidence contained in the abstract, which was heard by the master and certified to the court, the court was warranted in finding that the amount to which the appellant was entitled to was $200.00;

but under the law, the findings of fact in the decree cannot be contested by appellant, because the abstract does not show, that the evidence in the abstract, was all the evidence heard by the master; and all the evidence in the case. **Bedinger v. May**, 323 Ill. 187; **Glassman v. Lescht**, 318 Ill. 128.

For the reasons stated, the decree is affirmed.

Affirmed.